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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941 1940

No. 1023

A. J. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, ETC., PETITIONER,

vs.

THE UNION TERMINAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 5, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

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CAPTION.

BE IT REMEMBERED, that at a regular term of the United States District Court in and for the Northern District of Texas, begun and holden at Dallas, Texas, on the 6th day of May, A. D. 1940, and which said term of Court is now in session, the Honorable William H. Atwell, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to-wit:

A. J. PICKETT, General Chairman of the Brotherhood, of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

Plaintiff,

versus No. 248-Civil.

THE UNION TERMINAL COMPANY, a corporation,

Defendant.

2

COMPLAINT.

Filed March 7, 1940.

(Title Omitted.)

I.

Jurisdiction in this case is conferred upon this Court under Section 41 (8) of Title 28 of the United States Code

for the reason that this suit is a civil action at law arising under a law of the United States regulating Interstate Commerce since it arises under the statute of the United States enacted June 25, 1938, and entitled The Fair Labor Standards Act of 1938 (Chapter 676, Section 1, 52 Stat. 1060).

II.

Plaintiff, A. J. Pickett, states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees and is the duly authorized representative and attorney in fact of the hereinafter named persons designated herein as employees of the defendant, and plaintiff states that he has been duly authorized by each of the hereinafter named persons to bring this action in their behalf as provided for in Section 16, Paragraph B of the Fair Labor Standards Act of 1938 as referred to in paragraph One of this complaint. Plaintiff further states that the defendant is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas, used and necessary in the transportation of persons and

3 property in Interstate Commerce; that at its said terminal defendant employs and at all times since October 24, 1938, has employed Issac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingworth, J. T. Turpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Chas. Langston, Chas. Mackleroy, Filex Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, William McMurray, Sam H. Williams, Ernest Amos, Harry Barton, Adolphus Wells, Alfonso Con-

nor, Lawrence McNeil, Carnelius Busby, Columbus Jackson, Everet Matthews, Frank Southern, James Foster, Scott Campbell, who are commonly known as red caps in the handling of hand-baggage and travelling effects for passengers and otherwise assisting their passage through said terminal; that substantially all the passengers assisted by said red caps were and are in transit to and among the several states of the United States; that during the work-week beginning October 24, 1938, and continuing to the date hereof defendant at its said terminal in Dallas, Texas, has employed and is employing the aforesaid employees in Interstate Commerce, and that the services so performed by the aforesaid employees and defendant were during all of said time and now are an essential part of the transportation of passengers and property among the several states of the United States, and that said employees and defendant while performing such services were during all said time and now are engaged in commerce among the several states of the United States.

III.

Under the terms and provisions of the Fair Labor Standards Act of 1938, Section 6 (29 U. S. C. A. 206; 52 Stat. 1060), defendant was required to pay to each of the aforesaid employees wages at the rate of not less than 25c an hour from October 24, 1938, to October 23, 1939, and not less than 30c an hour from and after October 24, 1939.

IV.

Notwithstanding the requirements of said Fair Labor Standards Act of 1938, defendant has failed and refused to pay the aforesaid employees or any of them the sum of 25c an hour from October 24, 1938, to October
4 23, 1939, and the sum of 30c an hour from and after October 24, 1939, to the date hereof, and

has paid the aforesaid employees no wages as such at all from October 24, 1938, to the date hereof.

That each of the aforesaid employees has from October 24, 1938, to October 23, 1939, worked a total of 2920 hours for defendant as a red cap, as aforesaid, for which each of the aforesaid employees is entitled to wages in the sum of Seven Hundred Thirty Dollars ($730.00), and that each of the aforesaid employees has since October 24, 1939, to the date hereof worked a total of 1072 hours, for which he is entitled to wages in the sum of Three Hundred Twenty-one Dollars and Sixty Cents ($321.60); that there is now due and owing from defendant to each of the aforesaid employees for wages from October 24, 1938, to the date hereof the sum of One Thousand Fifty-one Dollars and Sixty Cents ($1,051.60).

Wherefore, plaintiff prays that judgment be entered herein against defendant in favor of each of the aforesaid employees for the sum of One Thousand Fifty-one Dollars and Sixty Cents ($1,051.60) for the amount of the unpaid minimum wages due him, and for an additional equal amount as liquidated damages, and that the Court further allow a reasonable attorney's fee to be paid by defendant and for the costs of this action.

CHAS. M. HAY & S. D. FLANAGAN,
Attorneys for Plaintiff.

506 Olive Street,
St. Louis, Missouri.

MOTION OF DEFENDANT FOR MORE DEFINITE STATEMENT AND TO STRIKE.

Filed March 28, 1940.

(Title Omitted.)

The defendant moves the Court as follows:

I. To require:

(a) That Plaintiff file herein a more definite statement or a bill of particulars wherein will be set forth the following:

1. A definite statement of the contract or agreement of employment of the redcaps named in the complaint and whether oral or in writing.

2. The total amounts which each of the parties hereto and each of the persons on whose behalf this action may be deemed to have been brought has received for his services as such red cap at or near the station of Defendant for each pay period from October 24, 1938 to
6 October 23, 1939 and from October 24, 1939 to the date of filing the complaint, including the amounts that each red cap has received from all sources during said time for his services as a red cap at or near said station, including tips or compensation received by him.

3. The total amounts which each of said red caps has received directly from Defendant for his services at or near the station of Defendant.

II. To strike from the complaint the following immaterial and irrelevant matters:

(a) That part of Paragraph II of the complaint reading as follows:

"Plaintiff A. J. Pickett states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks Freight Handlers, Express and Station Employees."

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
JOHN C. ROBERTSON,
GUS M. HODGES,
Attorneys For Defendant.

505 Republic Bank Building,
Dallas, Texas.

The foregoing motion was served upon said Plaintiff in said action by mailing a copy thereof by U. S. Mail on this 26th day of March A. D. 1940.

GUS M. HODGES,
Attorney For Defendant.

ORDER ON DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT.

7 Filed May 9, 1940.

On This the 6th day of May, 1940, came on to be heard the defendant's motion for more definite statement and to strike, and upon due hearing the Court ruled as follows:

Sub-paragraph 1 of paragraph I, is sustained to the extent of requiring plaintiff to allege whether said contract agreement is oral or in writing and is otherwise overruled.

Sub-paragraph 2 of paragraph I, is sustained to the extent of requiring plaintiff to set out tips or compensation received by each of the persons for whom this suit is brought during the period from March 1939 to October 1939, and is otherwise overruled.

Sub-paragraph 3 of Paragraph I is overruled.

Paragraph II is overruled.

Plaintiff shall amend within the time required by law and thereafter defendant shall answer within the time required by law.

WM. H. ATWELL,
U. S. Dist. Judge.

OK as to form:
S. D. FLANAGAN,
GUS M. HODGES.

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8 NOTICE TO PRODUCE.

Filed May 3, 1940.

To the above-named defendant, Robertson, Leachman, Payne, Gardere and Lancaster, John C. Robertson and Gus M. Hodges, its attorneys of record:

You are hereby requested to produce at the trial of the above-entitled cause, which is set for hearing on May 6, 1940, and at any later date on which said cause may be called for trial, the following papers and documents:

I. Original signed working agreement, dated January 1, 1940, between the Union Terminal Company and the Brotherhood of Railway and Steamship Clerks, Freight

Handlers, Express and Station Employees, covering red caps employed by the Union Terminal Company;

2. Payroll records of the Union Terminal Company, showing the hours worked by, wages earned by, wages paid to, and tips reported by the red caps employed by the Union Terminal Company at its passenger station at Dallas, Texas, for the period from October 24, 1938, to March 31, 1940, inclusive, and records of said company, showing tips reported by said red caps to said company for each day from March 1 1940, to March 6, 1940, inclusive, and hours worked by said red caps each day from March 1, 1940, to March 6, 1940, inclusive.

3. Letter from A. J. Pickett, General Chairman of the Union Terminal Company System Board of Adjustment, dated October 24, 1938, addressed to Mr. Murrell L. Buckner, Vice-President and General Manager of the Union Terminal Company, Dallas, Texas, protesting on behalf of the red cap employees of said company against the accounting and guaranteee system proposed by said company in its notices to its red cap employees, dated October 22, 1938.

9 You are further notified that unless the foregoing papers and documents are produced in compliance with this notice, secondary evidence will be used to prove the contents of the same.

CHARLES M. HAY,
S. D. FLANAGAN,
W. I. SAVAGE,
Attorneys for Plaintiff.

Service of a copy of the foregoing notice to produce on us is acknowldeged, this 3rd day of May, 1940.

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
GUS M. HODGES,
Attorneys for defendant.

10 AMENDED COMPLAINT.

Filed May 9, 1940.

(Title Omitted.)

I.

Jurisdiction of this cause is conferred upon this Court by Section 41 (8) of Title 28 of the United States Code for the reason that this suit is a civil action at law arising under a law of the United States regulating interstate commerce since it arises under the statute of the United States enacted June 25, 1938, entitled "The Fair Labor Standards Act of 1938" (Chapter 676, Section 1, 52 Stat. 1060).

II.

Plaintiff A. J. Pickett states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees, and is the duly authorized representative and attorney in fact of the hereinafter named persons designated herein as employees of the defendant, and that he has been duly authorized by each of the hereinafter named persons to bring this action in their behalf, as provided for in Section 16, Paragraph (b), of the Fair Labor Standards Act of 1938.

11 III.

Plaintiff further states that the defendant is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad teminal and terminal facilities in the City of Dallas, Texas, used and

necessary in the transportation of persons and property employs and at all times since October 24, 1938, has employed James Foster, Isaac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingsworth, J. T. Turpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Charles Langston, Charles Muckleroy, Felix Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, Willam McMurray, Sam H. Wiliams, Ernest Amos, Harry Barton, Adolphus Wells, Alphonso Connor, Lawrence McNeil, Cornelius Busby, Columbus Jackson, Everett Mathews, Frank Southern, Scott Campbell, H. N. Barton, Silas Kelton, Frank Bailey and Russell Elston, who are commonly known as red caps, to handle hand baggage and traveling effects of passengers and otherwise to assist their passage through said terminal; that substantially all the passengers assisted by said red caps were and are in transit to and among the several states of the United States; that during the work week beginning October 24, 1938, and continuing to the date hereof defendant at its said terminal in Dallas, Texas, has employed and is employing the aforesaid employees in interstate commerce, and that the services so performed by the aforesaid employees and defendant were during all of said time and now are an essential part of the transportation of passengers and property among the several states of the United States, and that said employees and defendant while performing such services were during all said time and now are engaged in such transportation, and in commerce among the several states of the United States.

12 IV.

Under the terms and provisions of the Fair Labor Standards Act of 1938, Section 6 (29 U. S. C. A. 206, 52

Stat. 1060), defendant was required to pay to each of the aforesaid employees wages at the rate of not less than Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23, 1939, and not less than Thirty Cents ($.30) an hour from and after October 24, 1939.

V.

Notwithstanding the requirements of said Fair Labor Standards Act of 1938, defendant has failed and refused to pay the aforesaid employees or any of them the sum of Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23, 1939, and the sum of Thirty Cents ($.30) an hour from and after October 24, 1939, to the date of the filing of this suit, but has paid said employees only a small part of said wages; that the following table shows in detail as to each of said employees the hours worked during the period from October 24, 1938, to October 23, 1939, the amount of wages earned at Twenty-Five Cents ($.25) per hour during said period, the hours worked during the period from October 24, 1939, to March 6, 1940, the amount of wages earned at Thirty Cents ($.30) per hour during said period, the total wages earned from October 24, 1938, to March 6, 1940, the total of the amount paid by defendant to each of said employees as wages for said latter period, and the amount paid on his behalf as taxes, and the balance due on the wages earned during said period from October 24, 1938, to March 6, 1940:

			Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Foster, James					
2,818½	hours @ $ .25	$704.56			
1,026	hours @ .30	307.80			
			$1,012.36	$47.20	$965.16
Johnson, Isaac					
2,783½	hours @ $ .25	0695.88			
1,040	hours @ .30	312.00			
			1,007.88	44.86	963.02
Franks, J. C.					
2,899-1/6	hours @ $ .25	$724.00			
1,084-11/12	hours @ .30	325.47			
			1,050.27	36.80	1,013.47
Brigham, J. W.					
2,880	hours @ $ .25	$720.00			
1,080	hours @ .30	324.00			
			1,044.00	29.03	1,014.97
Brooks, Lemuel					
2,832	hours @ $ .25	$708.00			
1,040	hours @ .30	312.00			
			1,020.00	44.62	975.38

Johnson, A. R.				
2,739 hours @ $ .25	$684.75			
1,044 hours @ .30	313.20			
		997.95	46.95	951.00
Jefferson, John				
2,880 hours @ $ .25	$720.00			
1,080 hours @ .30	324.00			
		1,044.00	40.97	1,003.03
Alexander, O. A.				
2,912 hours @ $ .25	$728.00			
1,003-1/6 hours @ .30	300.95			
		1,028.95	44.87	984.08
Jackson, Joe				
2,912 hours @ $ .25	$728.00			
1,036-1/6 hours @ .30	310.85			
		1,038.85	48.25	990.60
McIntosh, Nathan				
2,912 hours @ $ .25	$728.00			
912 hours @ .30	273.60			
		1,001.60	43.20	958.40

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Turner, Nelson				
2,896 hours @ $ .25	$724.00			
1,020 hours @ .30	306.00			
		1,030.00	48.29	981.71
Thomas, Allen				
2,556 hours @ $ .25	$639.00			
1,024 hours @ .30	307.20			
		946.20	39.03	907.17
Williams, Richard				
2,910 hours @ $ .25	$727.50			
1,072 hours @ .30	321.60			
		1,049.10	26.90	1,022.20
Hollingsworth, Ulyssus				
2,661½ hours @ $ .25	$665.38			
1,040 hours @ .30	312.00			
		977.38	54.02	923.36
Turpin, J. T.				
2,240 hours @ $ .25	$560.00			
1,040 hours @ .30	312.00			
		872.00	33.91	838.00

Campbell, Dave				
2,576 hours @ $ .25	$644.00			
884 hours @ .30	265.20			
		909.20	37.58	871.62
Fields, Nelson				
2,556 hours @ $ .25	$639.00			
1,072 hours @ .30	321.60			
		960.60	45.24	915.36
Robertson, C. H.				
2,227½ hours @ $ .25	$556.88			
758 hours @ .30	327.40			
		784.28	40.35	743.93
Hunt, Haywood				
2,872 hours @ $ .25	$718.01			
1,080 hours @ .30	324.00			
		1,042.01	54.12	987.89
Spears, Donald				
2,873-2/3 hours @ $ .25	$718.42			
1,072 hours @ .30	321.60			
		1,040.02	38.19	1,001.83

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Hynson, Clinton				
2,728 hours @ $ .25	$682.00			
1,060 hours @ .30	318.00			
		1,000.00	27.27	972.93
Curry, J. P.				
2,856 hours @ $ .25	$714.00			
1,064 hours @ .30	319.20			
		1,033.20	43.36	989.84
Langston, Charles				
2,690 hours @ $ .25	$672.50			
1,065 hours @ .30	319.50			
		992.00	79.05	916.95
Muckelroy, Charles				
2,880 hours @ $ .25	$720.00			
1,048 hours @ .30	314.40			
		1,034.40	123.92	910.70
Jackson, Felix				
2,904 hours @ $ .25	$726.00			
1,080 hours @ .30	324.00			
		1,050.00	54.10	995.90

Brigham, Paul				
2,801½ hours @ $ .25	$700.38			
984 hours @ .30	295.20			
		995.58	29.80	965.78
May, Arthur				
2,865-2/3 hours @ $ .25	$716.42			
1,050 hours @ .30	315.00			
		1,031.42	63.79	967.63
Jones, Theodore				
1,936 hours @ $ .25	$ 484.00			
736 hours @ .30	220.80			
		704.80	26.33	678.47
Cameron, Tilson W.				
2,160 hours @ $ .25	$340.00			
923 hours @ .30	376.90			
		816.90	37.56	779.34
McMurray, William				
2,752 hours @ $ .25	$688.00			
1,064 hours @ .30	319.20			
		1,007.20	56.38	950.82

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Williams, Sam H.				
472 hours @ $ .25	$118.00			
147-1/6 hours @ .30	44.15			
		162.15	8.48	153.67
Amos, Earnest				
2,860 hours @ $ .25	$715.00			
1,070 hours @ .30	321.00			
		1,036.00	235.46	800.55
Barton, Harry				
2,694½ hours @ $ .25	$673.63			
1,080 hours @ .30	324.00			
		997.63	33.84	963.79
Wells, Adolphus				
2,204 hours @ $ .25	$551.00			
1,056 hours @ .30	316.80			
		867.80	54.02	813.78
Connor, Alphonso				
27,676 hours @ $ .25	$665.00			
1,056 hours @ .30	316.80			
		981.80	44.30	937.50

McNeil, Lawrence				
2,828 hours @ $ .25	$707.00			
1,001 hours @ .30	300.30			
		1,007.30	110.43	899.26
Busby, Cornelius				
992 hours @ $ .25	$248.00			
1,059¾ hours @ .30	317.93			
		565.93	44.25	521.68
Jackson, Columbus				
2,872 hours @ $ .25	$718.00			
1,080 hours @ .30	324.00			
		1,042.00	48.71	993.29
Mathews, Everett				
2,720 hours @ $ .25	$670.00			
990¼ hours @ .30	297.08			
		977.08	35.14	942.24
Southern, Frank				
2,768 hours @ $ .25	$692.00			
1,003¾ hours @ .30	301.13			
		993.13	32.01	961.12
Campbell, Scott				
48 hours @ $ .25	$12.00			
		12.00	3.00	9.00

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Barton, H. N.				
2,753½ hours @ $ .25	$688.38			
1,064 hours @ .30	319.20			
		1,007.58	34.72	972.86
Kelton, Silas				
584 hours @ $ .25	$146.01			
222-1/3 hours @ .30	66.70			
		212.71	15.35	197.36
Bailey, Frank				
1,351 hours @ $ .25	$337.75			
405-11/12 hours @ .30	121.77			
		459.52	17.81	441.71
Ellston, Russell				
2,896 hours @ $ .25	$724.00			
1,081½ hours @ .30	324.45			
		1,048.45	31.51	1,016.94
		40,893.23	2,134.97	38,765.38

VI.

That the amount respectively set opposite the name of each red cap in the column headed "Balance Due" in the above table, was received by each of said red caps as tips from passengers at and about defendant's terminal from October 24, 1938, to March 6, 1940.

VII.

That there is now due and owing to said employees from defendant the total sum of Thirty-Eight Thousand Seven Hundred Sixty-Five Dollars and Thirty-Eight Cents ($38,765.38), being the total minimum wages remaining unpaid for the period from October 24, 1938 to March 6, 1940.

Wherefore, plaintiff prays that judgment be entered herein against defendant in favor of plaintiff for the sum of Thirty-Eight Thousand Seven Hundred Sixty-Five Dollars and Thirty-Eight Cents ($38,765.38), being the amount of the unpaid minimum wages due said employees, as aforesaid, and for an additional equal amount as liquidated damages, and that the Court further allow a reasonable attorney's fee to be paid by defendant, and the costs of this action.

W. T. SAVAGE,
(W. T. Savage)

Dallas, Texas.

CHAS. M. HAY,
(Charles M. Hay)

506 Olive, St. Louis, Mo.

S. D. FLANAGAN,
(S. D. Flanagan)

St. Louis, Mo.

ED. D. FRANEY.

St. Louis, Mo.

DEFENDANT'S ANSWER.

Filed May 17, 1940.

(Title Omitted.)

I.

Defendant denies the allegations of Paragraph I of Plaintiff's Amended Complaint, and shows that the alleged action is not one coming within "The Fair Labor Standards Act of 1938" or of any other law of the United States regulating Interstate Commerce.

II.

As to Paragraph II of Plaintiff's Amended Complaint, defendant admits that A. J. Pickett is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freght Handlers, Express and Station Employees; defendant denies that the "Fair Labor Standard Act of 1938" is applicable to the cause; defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of Paragraph II.

III.

As to Paragraph III of Plaintiff's Amended Complaint, defendant admits that it "is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas"; defendant denies that it employed or had employed the persons named, but says said named persons did work in and around defendant's premises during the times mentioned as red caps, handling the baggage and traveling

effects of persons entering and leaving its premises. Defendant denies all of the allegations of said paragraph except as expressly alleged or explained above.

IV.

Defendant denies the allegations of Paragraph IV of Plaintiff's Amended Complaint.

V.

Defendant denies all of the allegations of Paragraph V of Plaintiff's Amended Complaint, except as hereinafter specifically set out:

(a) Prior to October 24, 1938, the defendant delivered a notice, a copy of which is hereto attached and marked Exhibit "A", to each of the Red Caps set out in Plaintiff's amended complaint and all other Red Caps working in and about defendant's station, notifying them that defendant guaranteed to each of them continuing work as Red Caps after October 24, 1938, that they would receive as compensation not less than the minimum provided by the Fair Labor Standard Act; that said Red Caps should report to defendant the amount of tips and remunerations collected by them each day, and that instead of turning such tips and remunerations in to defendant, said Red Caps should retain all such tips and remunerations subject to being credited upon the guaranteed compensation and subject also to the requirement that each Red Cap pay to defendant the amount of taxes imposed by law upon such Red Cap and required by law to be collected by defendant.

(b) Thereafter pursuant to such notice the Red Caps and each of them reported each day to defendant the number of hours worked and the amount of tips and remunera-

tion collected; and such Red Caps were allowed to and did retain for their own use and benefit all such tips and remunerations collected by them while working about defendant's premises instead of turning them in to defendant; in addition, for each work period between October 24, 1938, and October 24, 1939, during which the tips and remunerations collected and retained by each Red Cap did not equal the number of hours worked multiplied by twenty-five cents (25 cents), the defendant paid to each of such Red Caps an amount equal to the difference; and for each work period after October 24, 1939, during which the tips and remunerations collected and retained did not equal the number of hours worked multiplied by thirty cents (30 cents) defendant paid to each Red Cap the difference; so that defendant has fully complied with its guarantee and has paid to and each Red Cap has received not less than the minimum provided by the Fair Labor Standards Act, notwithstanding such Act is inapplicable to them.

(c) With regard to the table of figures set out in Paragraph V of Plaintiff's Amended Complaint, defendant shows that it has not yet completed a full check of such figures, but that subject to possible minor differences revealed by such check and subject to its denial that the titles used as headings for the columns are appropriate or applicable, defendant admits that the named persons worked as Red Caps the number of hours set forth; that the amounts under the heading "Total Wages
21 Earned" are the correct result of multiplying the hours worked by twenty-five cents (25 cents) and thirty cents (30 cents) as shown; that the amounts shown in the next column were actually paid to the persons named by the defendant; and that the amounts in the last right hand column are the correct remainders when the amounts in the next to last column are deducted from the amounts in the preceding column. Any part of the next

to last column attributable to taxes paid, constitutes taxes imposed upon the individual Red Cap and required by law to be collected by the defendant.

VI.

As to Paragraph VI of Plaintiff's Amended Complaint, defendant shows that each of said Red Caps named received in excess of the amount shown opposite, in tips and remunerations, otherwise defendant denies the allegations of said paragraph.

VII.

Defendant denies all of the allegations of Paragraph VII of Plaintiff's Amended Complaint and all of the prayer of said complaint.

Wherefore, defendant prays that plaintiff take nothing by his suit and that defendant have judgment adjudicating that none of the persons named in plaintiff's Amended Complaint have any claim against defendant, and for all costs.

ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
By ROBERT G. PAYNE,
GUS M. HODGES.

Answer served by mailing a copy thereof to Counsel for Plaintiff, May 16th, 1940.

22 SECOND AMENDED COMPLAINT.

Filed May 20, 1940.

(Title Omitted.)

I.

Jurisdiction of this cause is conferred upon this Court by Section 41 (8) of Title 28 of the United States Code for the reason that this suit is a civil action at law arising under a law of the United States regulating interstate commerce since it arises under the statute of the United States enacted June 25, 1938, entitled "The Fair Labor Standards Act of 1938" (Chapter 676, Section 1, 52 Stat. 1060).

II.

Plaintiff A. J. Pickett states that he is the General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station employees, and is the duly authorized representative and attorney in fact of the hereinafter named persons designated herein as employees of the defendant, and that he has been duly authorized by each of the hereinafter named persons to bring this action in their behalf, as provided for in Section 16, Paragraph (b), of the Fair Labor Standards Act of 1938.

23 III.

Plaintiff further states that the defendant is a corporation organized, existing and doing business under the laws of the State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas, used and necessary in the transportation of persons and property in interstate commerce; that at its said terminal defendant

employes and at all times since October 24, 1938, has employed under an oral contract James Foster, Isaac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingsworth, J. T. Turpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Charles Langston, Charles Muckleroy, Felix Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, William McMurray, Sam H. Williams, Ernest Amos, Harry Barton, Adolphus Wells, Alphonso Connor, Lawrence McNeil, Cornelius Busby, Columbus Jackson, Everett Mathews, Frank Southern, Scott Campbell, H. N. Barton, Silas Kelton, Frank Bailey and Russell Elston, who are commonly known as red caps, to handle hand baggage and traveling effects of passengers and otherwise to assist their passage through said terminal; that substantially all the passengers asisted by said red caps were and are in transit to and among the several states of the United States; that during the work week beginning October 24, 1938, and continuing to the date hereof defendant at its said terminal in Dallas, Texas, has employed and is employing the aforesaid employees in interstate commerce, and that the services so performed by the aforesaid employees and defendant were during all of said time and now are an essential part of the transportation of passengers and property among the several states of the United States, and that said employees and defendant while performing such services were during all said time and now are engaged in such transportation, and in commerce among the several states of the United States.

24 IV.

Under the terms and provisions of the Fair Labor Standards Act of 1938, Section 6 (29 U. S. C. A. 206, 52

Stat. 1060), defendant was required to pay to each of the aforesaid employees wages at the rate of not less than Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23), 1939, and not less than Thirty Cents ($.30) an hour from and after October 24, 1939.

V.

Notwithstanding the requirements of said Fair Labor Standards Act of 1938, defendant has failed and refused to pay the aforesaid employees or any of them the sum of Twenty-Five Cents ($.25) an hour from October 24, 1938, to October 23, 1939, and the sum of Thirty Cents ($.30) an hour from and after October 24, 1939, to the date of the filing of this suit, but has paid said employees only a small part of said wages; that the following table shows in detail as to each of said employees the hours worked during the period from October 24, 1938, to October 23, 1939, the amount of wages earned at Twenty-Five Cents ($.25) per hour during said period, the hours worked during the period from October 24, 1939, to March 6, 1940, the amount of wages earned at Thirty Cents ($.30) per hour during said period, the total wages earned from October 24, 1938, to March 6, 1940, the total of the amount paid by defendant to each of said employees as wages for said latter period, and the amount paid on his behalf as taxes, and the balance due on the wages earned during said period from October 24, 1938, to March 6, 1940:

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Foster, James				
2,818½ hours @ $ .25	$704.56			
1,024 hours @ .30	307.20			
		$1,011.76	$49.06	$ 962.70
Johnson, Isaac				
2,783½ hours @ $ .25	0695.88			
1,040 hours @ .30	312.00			
		1,007.88	45.69	962.19
Franks, J. C.				
2,899-1/6 hours @ $ .25	$724.80			
1,084-11/12 hours @ .30	325.47			
		1,050.27	40.25	1,010.02
Brigham, J. W.				
2,880 hours @ $ .25	$720.00			
1,080 hours @ .30	324.00			
		1,044.00	33.83	1,010.17
Brooks, Lemuel				
2,832 hours @ $ .25	$708.00			
1,040 hours @ .30	312.00			
		1,020.00	49.63	970.37

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Johnson, A. R.				
2,835 hours @ $ .25	$708.75			
1,044 hours @ .30	313.20			
		1,021.95	47.78	974.17
Jefferson, John				
2,880 hours @ $ .25	$720.00			
1,080 hours @ .30	324.00			
		1,044.00	45.77	998.23
Alexander, O. A.				
2,912 hours @ $ .25	$728.00			
1,003-1/6 hours @ .30	300.95			
		1,028.95	52.00	976.95
Jackson, Joe				
2,912 hours @ $ .25	$728.00			
1,036-1/6 hours @ .30	310.85			
		1,038.85	52.52	986.33
McIntosh, Nathan				
2,912 hours @ $ .25	$728.00			
912 hours @ .30	273.60			
		1,001.60	49.51	952.00

Turner, Nelson				
2,896 hours @ $ .25	$724.00			
1,020 hours @ .30	306.00			
		1,030.00	55.52	974.48
Thomas, Allen				
2,784 hours @ $ .25	$696.00			
1,024 hours @ .30	307.20			
		1,003.20	44.28	958.92
Williams, Richard				
2,910 hours @ $ .25	$727.50			
1,072 hours @ .30	321.60			
		1,049.10	30.90	1,018.20
Hollingsworth, Ulyssus				
2,661½ hours @ $ .25	$665.38			
1,040 hours @ .30	312.00			
		977.38	59.41	917.97
Turpin, J. T.				
2,240 hours @ $ .25	$560.00			
1,040 hours @ .30	312.00			
		872.00	39.50	832.50

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Campbell, Dave				
2,556 hours @ $ .25	$639.00			
882 hours @ .30	264.60			
		903.60	40.18	863.42
Fields, Nelson				
2,556 hours @ $ .25	$639.00			
1,072 hours @ .30	321.60			
		960.60	49.89	910.71
Robertson, C. H.				
2,227½ hours @ $ .25	$556.88			
758 hours @ .30	327.40			
		784.28	46.15	738.13
Hunt, Haywood				
2,872 hours @ $ .25	$718.01			
1,080 hours @ .30	324.00			
		1,042.01	60.44	981.57
Spears, Donald				
2,873-2/3 hours @ $ .25	$718.42			
1,072 hours @ .30	321.60			
		1,040.02	45.08	994.94

Hynson, Clinton				
2,728 hours @ $ .25	$682.00			
1,060 hours @ .30	318.00			
		1,000.00	29.32	970.68
Curry, J. P.				
2,856 hours @ $ .25	$714.00			
1,064 hours @ .30	319.20			
		1,033.20	48.68	984.52
Langston, Charles				
2,696 hours @ $ .25	$674.00			
1,065 hours @ .30	319.50			
		993.50	83.78	909.72
Muckelroy, Charles				
2,880 hours @ $ .25	$720.00			
1,048 hours @ .30	314.40			
		1,034.40	124.28	910.12
Jackson, Felix				
2,904 hours @ $ .25	$726.00			
1,080 hours @ .30	324.00			
		1,050.00	58.63	991.37

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
Brigham, Paul				
2,801½ hours @ $ .25	$700.38			
984 hours @ .30	205.20			
		995.58	34.61	960.97
May, Arthur				
2,865-2/3 hours @ $ .25	$716.42			
1,050 hours @ .30	315.00			
		1,031.42	70.42	961.00
Jones, Theodore				
1,936 hours @ $ .25	$ 484.00			
734 hours @ .30	220.20			
		704.20	26.50	677.70
Cameron, Tilson W.				
2,160 hours @ $ .25	$540.00			
923 hours @ .30	276.90			
		816.90	43.00	773.90
McMurray, William				
2,752 hours @ $ .25	$688.00			
1,062 hours @ .30	318.60			
		1,006.60	64.31	942.29

Williams, Sam H.				
472 hours @ $ .25	$118.00			
147-1/6 hours @ .30	44.15			
		162.15	10.21	151.94
Amos, Earnest				
2,860 hours @ $ .25	$715.00			
1,065 hours @ .30	319.50			
		1,034.50	236.56	797.94
Barton, Harry				
2,694½ hours @ $ .25	$673.63			
1,080 hours @ .30	324.00			
		997.63	41.75	955.88
Wells, Adolphus				
2,204 hours @ $ .25	$551.00			
1,056 hours @ .30	316.80			
		867.80	58.36	809.44
Connor, Alphonso				
2,676 hours @ $ .25	$669.00			
1,056 hours @ .30	316.80			
		985.80	50.03	935.77

		Total Wages Earned	Total Wages and Taxes Paid by Defendant	Balance Due
McNeil, Lawrence				
2,828 hours @ $ .25	$707.00			
1,001 hours @ $ .25	300.30			
		1,007.30	114.80	892.50
Busby, Cornelius				
992 hours @ $ .25	$248.00			
1,059¾ hours @ .30	317.93			
		565.93	47.91	518.02
Jackson, Columbus				
2,872 hours @ $ .25	$718.00			
1,001 hours @ .30	300.30			
		1,042.00	53.61	988.39
Mathews, Everett				
2,680 hours @ $ .25	$670.00			
990¼ hours @ .30	297.08			
		967.08	40.35	926.73
Southern, Frank				
2,768 hours @ $ .25	$692.00			
1,003¾ hours @ .30	301.13			
		993.15	37.17	955.96

Campbell, Scott				
48 hours @ $ .25	$12.00			
		12.00	3.00	9.00
Barton, H. N.				
2,753½ hours @ $ .25	$688.38			
1,064 hours @ .30	319.20			
		1,007.58	42.03	965.55
Kelton, Silas				
584 hours @ $ .25	$146.01			
222-1/3 hours @ .30	66.70			
		212.71	16.36	196.35
Bailey, Frank				
1,351 hours @ $ .25	$337.75			
405-11/12 hours @ .30	121.77			
		459.52	20.72	438.80
Ellston, Russell				
2,896 hours @ $ .25	$724.00			
1,081½ hours @ .30	324.45			
		1,048.45	40.06	1,008.39
		$40,960.83	2,333.84	$38,626.99

VI.

That the amount respectively set opposite the name of each red cap in the column headed "Balance Due" in the above table, was received by each of said red caps as tips from passengers at and about defendant's terminal from October 24, 1938, to March 6, 1940.

VII.

That there is now due and owing to said employees from defendant the total sum of Thirty-eight Thousand Six Hundred Twenty-six Dollars and Ninety-nine Cents ($38,626.99), being the total minimum wages remaining unpaid for the period from October 24, 1938, to March 6, 1940.

Wherefore, plaintiff prays that judgment be entered herein against defendant in favor of plaintiff for the sum of Thirty-eight Thousand Six Hundred Twenty-six Dollars and Ninety-nine Cents ($38,626.99), being the amount of the unpaid minimum wages due said employees, as aforesaid, and for an additional equal amount as liquidated damages, and that the Court further allow a reasonable attorney's fee to be paid by defendant, and the costs of this action.

W. T. SAVAGE,
(W. T. Savage)
CHARLES M. HAY,
(Charles M. Hay)
S. D. FLANAGAN,
(S. D. Flanagan)
EDWIN D. FRANEY.
(Edwin D. Franey)

Copy delivered to Deft.'s Atty., May 20, 1940.
W. T. SAVAGE,
Atty. for Plff.

31 JUDGMENT.

Filed May 28, 1940.

(Title Omitted.)

This cause came on to be heard on the 27th day of May, A. D. 1940, before the Court sitting without a jury, and the Court having heard the evidence adduced, and the argument of counsel, and being unable to conclude the hearing on said day, the cause was laid over to the 28th day of May, 1940, and said hearing being now concluded, it is Ordered, Adjudged and Decreed that Plaintiff, A. J. Pickett, have and recover of defendant The Union Terminal Company, for and on behalf of each of the following named individuals, the sums opposite their names found by the Court to be unpaid minimum wages and liquidated damages, respectively, and that plaintiff have and recover of defendant an attorney's fee of $500.00, making a total sum of $77,753.98, together with the costs of this proceeding, which plaintiff shall have and
32 recover of defendant, and that execution issue therefor.

	Unpaid Minimum Wages	Liquidated Damages	Total Unpaid Minimum Wages and Liquidated Damages
Foster, James	$962.70	$962.70	$1,925.40
Johnson, Isaac	962.19	962.19	1,924.38
Franks, J. C.	1,010.02	1,010.02	2,020.04
Brigham, J. W.	1,010.17	1,010.17	2,020.34
Brooks, Lemuel	970.37	970.37	1,940.74
Johnson, A. R.	974.17	974.17	1,948.34
Jefferson, John	998.23	998.23	1,996.46
Alexander, O. A.	976.95	976.95	1,953.90
Jackson, Joe	986.33	986.33	1,972.66
McIntosh, Nathan	952.09	952.09	1,904.18
Turner, Nelson	974.48	974.48	1,948.96

	Unpaid Minimum Wages	Liquidated Damages	Total Unpaid Minimum Wages and Liquidated Damages
Thomas, Allen	958.92	958.92	1,917.84
Williams, Richard	1,018.20	1,018.20	2,036.40
Hollingsworth, Ulyssus	917.97	917.97	1,835.94
Turpin, J. T.	832.50	832.50	1,665.00
Campbell, Dave	863.42	863.42	1,726.84
Fields, Nelson	910.71	910.71	1,821.42
Robertson, C. H.	738.13	738.13	1,476.26
Hunt, Haywood	981.57	981.57	1,963.14
Spears, Donale	994.94	994.94	1,989.88
Hynson, Clinton	970.68	970.68	1,941.36
Curry, J. P.	984.52	984.52	1,969.04
Langston, Charles	909.12	991.12	1,819.44
Muckelroy, Charles	910.12	910.12	1,820.24
Jackson, Felix	991.37	991.37	1,982.74
Brigham, Paul	960.97	960.97	1,921.94
May, Arthur	961.00	961.00	1,922.00
Jones, Theodore	677.70	677.70	1,355.40
Cameron, Tilson W.	773.90	773.90	1,547.80
McMurray, William	942.29	942.29	1,884.58
Williams, Sam H.	151.94	151.94	303.88
Amos, Earnest	797.94	797.94	1,595.88
Barton, Harry	955.88	955.88	1,911.76
Wells, Adolphus	809.44	809.44	1,618.88
Connor, Alphonso	935.77	935.77	1,871.54
McNiel, Lawrence	892.50	892.50	1,785.00
Busby, Cornelius	518.02	518.02	1,036.04
Jackson, Columbus	988.39	988.39	1,976.78
Mathews, Everett	926.73	926.73	1,853.46
Southern, Frank	955.96	955.96	1,911.92
Campbell, Scott	9.00	9.00	18.00
Barton, H. N.	965.55	965.55	1,931.10
Kelton, Silas	196.35	196.35	392.70

	Unpaid Minimum Wages	Liquidated Damages	Total Unpaid Minimum Wages and Liquidated Damages
Bailey, Frank	438.80	438.80	877.60
Ellston, Russell	1,008.39	1,008.39	2,016.78
	$38,626.99	$38,626.99	$77,253.98

To the foregoing judgment the defendant in open Court objected and excepted.

Dated May 28th, 1940.

WM. H. ATWELL,
U. S. Dist. Judge.

O. K. as to form.
ROBERTSON, LEACHMAN, PAYNE, GARDERE & LANCASTER,
ROBERT G. PAYNE,
GUS M. HODGES,
Attorneys for Defendant.

Approved as to form.
S. D. FLANAGAN,
ED. FRANEY,
CHAS. M. HAY,
W. T. SAVAGE,
Attorneys for Plaintiff.

DEFENDANT'S MOTION FOR A NEW TRIAL.

34 Filed June 7, 1940.

(Title Omitted.)

To the Honorable Court:

Now comes The Union Terminal Company and moves the Court to set aside the judgment rendered herein and grant a new trial, on the following grounds:

I.

The Court erred in holding that this defendant's employer's notice of October 22, 1938, given to each of its Red Cap employees setting out the terms and conditions of their future employment did not bind the latter in law by their conduct in continuing in service, collecting, reporting and retaining tips, and accepting payment of the difference between the income received from tips and the minimum wage requirements from the defendant, because such clearly was a notice specifying conditions of future employment which in law was binding upon those em-
ployees thereafter continuing in service and ac-
35 cepting wages paid and based thereon, and said
Red Caps rejected their only alternative of exercising their right to quit work if dissatisfied with the terms of future employment prescribed by the employer in said notice.

II.

The Court erred in holding that the letter of protest written to defendant employer on October 24, 1938, by A. J. Pickett had the effect of depriving defendant of its right, exercised in its October 22nd notice, of prescribing

the terms of future employment for its employees; because the Red Caps, by continuing in the service, accepted the conditions of such notice, and such conduct had the legal effect of contradicting anything said or implied in said protest letter; and further because, in any event, said protest letter does not purport to be or does not amount to a refusal to be bound by the terms imposed upon them in their future employment, but is merely a statement of a legal opinion that the legal effect of the method prescribed is not in compliance with the Fair Labor Standards Law.

III.

The Court erred in failing to hold that, regardless of whether or not there was an agreement to the terms of the October 22nd notice, the defendant complied with the Fair Labor Standards Law; because if, as held by the Court, the Red Caps are defendant's employees it must follow that the service rendered the patrons is furnished by the employer defendant; that, unlike gratuities given over and above the price of the service, the tips were given in payment of the service rendered by defendant through the Red Caps, hence such payments for such service belonged in law to defendant, the one furnishing the service, and it had the right and power to
36 control and dispose of such income belonging to it, which right and power it exercised by applying same on wages. It was unnecessary for it to follow the formality or mechanics of having such payments manually delivered to defendant and then manually delivering it back to the Red Caps as wages, as the method prescribed and followed had that legal effect.

IV.

The Court erred in rendering judgment for the plaintiff herein for wages in the sum of $38,626.99 because the

plaintiff wholly failed to discharge the burden placed on him by law of alleging and proving that the $38,626.99, admittedly received by the Red Caps during the period, was paid to the Red Caps as a gratuity and was an amount over and above the amount paid by such patrons to and received by the company as compensation for the service rendered by the company to the patron through the Red Caps.

V.

The Court erred in holding that each of the Red Caps for whom this action is brought, was "engaged in commerce"; because the service performed by said Red Caps is purely local, forming no part of any interstate commerce and on the contrary is independently arranged for, directed and compensated for, not included in the price of ticket or arranged with and as a part of the interstate journey.

VI.

That under the pleadings and evidence, even though it be found that there was no contract making the retention of tips a payment of wages and that in the absence of such contract the tips collected and retained by the Red Caps were not wages paid them, still it appears as a matter of law that said Red Caps,
37 while acting in the course of their employment for defendant collected payments made by the defendant's patrons in the form of tips for services rendered to the patrons by the defendant through the Red Caps, which payments as a matter of law belong to defendant and which exactly offset any claim for wages by plaintiff, so that a new trial should therefore be granted. In the alternative, if the Court holds that such

offset should be formally set up by way of counterclaim. defendant asks the Court to grant a new trial herein and allow a trial on the issues raised by defendant's counterclaim in accordance with defendant's application for leave to file and be heard on such counterclaim.

Wherefore, Defendant prays, that the judgment herein be set aside and a new trial granted; and in the alternative defendant prays that it be allowed to file a counterclaim herein and have a trial on such counterclaim so that it may be disposed of in the final judgment herein.

JOHN C. ROBERTSON,
GUS M. HODGES,
ROBERT G. PAYNE,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

This motion served on plaintiffs by mailing a copy of same to plaintiff's counsel.

June 7, 1940.

BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL.

37½ In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, et al,
vs. No. 248 Civil Action.
The Union Terminal Company.

ROBERTSON, LEACHMAN, PAYNE, GARDERE & LANCASTER,
Attorneys for Defendant.

505 Republic Bank Bldg.,
Dallas, Texas.

38 In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, et al,
vs. No. 248 Civil Action.
The Union Terminal Company.

Brief in Support of Defendant's Motion for New Trial.

Preliminary Statement.

For thirteen years, the company furnished to the traveling public a service, in the form of assistance with baggage, by agreeing with the red caps that in consideration of their labor used in furnishing this service, each red cap could and would retain the entire income collected by him and paid by the public in return for the

service. Under this arrangement the company did not directly pay wages as such to the red caps but neither did it directly receive any income for the service it rendered through them. The service from an expense standpoint therefore was self sustaining, and each red cap's income was dependent upon the amount of work he did and his alertness to duty. He was automatically paid on a piece work basis. His total collections constituted his total wages for work performed. They were on its premises under this arrangement at the sufferance of the company.

In 1938 shortly prior to the effective date of the Wage & Hour Act, the Interstate Commerce Commission classified red caps as employees of the Terminals where they worked. The company by agreement still permitted the red caps to retain all of the income so collected, as it still had no wage expense in connection with them. During all of this time, as a matter of custom and common knowledge of the traveling public, compensation for such service was expected by the red cap and universally paid by the public. This agreement between the Union Terminal Company and the red caps, that the latter could work on its premises rendering this service to the patrons and retaining the tips in payment of the red cap labor, continued in force until October 22, 1938.

The effective date of the Wage & Hour Act was close at hand and while this company was of the opinion that these red cap employees were not engaged in interstate commerce, and they did not come within the provisions of the Act, nevertheless, there being no authoritative ruling or adjudication on the point, precaution demanded that it proceed in such a manner that, if it be wrong, it would not have

in the meantime violated the terms of such Act. Thus for the first time in many years the company, proceeding upon that basis, was about to incur a fixed expense for wages to these red caps in a large sum of money each year as is evidenced by the amount sued for herein. It was then the normal and businesslike thing for the management to consider and determine that, facing this new annual expenditure of many thousands of dollars for wages, it, as all other business facing a new expense must do, must provide for the necessary income with which to pay such new expense in the form of wages. The natural source of such income, which necessarily had to be secured, was from the persons who would receive the benefit of the services for which the wages were to be paid, namely, the patrons. Accordingly, the company notified each of said red cap employees, in the light of the Fair Labor Standards Act, that "in consideration of your *hereafter engaging in* the handling of hand baggage, etc., * * * it would be necessary that you report daily * * * the amount received by you as tips or remuneration *for such services* * * *. You are *privileged* to retain, *subject* to their being credited on such guarantee all such tips or remuneration * * *. All the matters above referred to are subject to the right of the carrier to determine from time to time * * * *the accounting* required." In the same letter the carrier guaranteed to each red cap "compensation, which *together with and including* the sums of money received as above provided, not less than the minimum wage provided by law".

41

Since the parties were not in disagreement concerning the exact workings of their prior arrangement, the sending of this notice to each of said employees very definitely terminated the prior agreement with reference to tips and working arrangements; and it notified

the red cap employees that the company would not agree any longer that the income derived from such service, the tips paid by the public for such service, could be unconditionally retained as the property of the red caps as had been the case in the past. It evidenced a very definite order and direction from the employer to the employee concerning the ownership and disposition of the income to be received by the employee while working in the course of his employment for the employer and received by him for doing exactly that work for which the company expected to begin paying wages which it had not theretofore paid. The notice clearly showed that the company claimed the ownership of this income derived from the service which it thereafter was going to render to the public at its own cost and expense and which it had not theretofore rendered to the public at its own cost and expense. Since it was the employer and the red caps were its employees and it was going to pay them wages to perform the work, it had a right to direct them in the manner and details of the
42 work and to require them to account for the proceeds derived from the work. There can be no question about the fact that the company clearly made the above a part of the future contract of employment of the red caps as is evidenced by the language "in consideration of *your hereafter engaging in* the *handling* of hand baggage", etc.

The employees, through their representative, under date of October 24, wrote to the company a letter designated by them as a "protest", by the terms of which the employees advised the company that in reply to the company's notice with reference to "crediting tips and other moneys paid * * * by persons other than itself", that said employees from "examination of the law in its entirety", were of the opinion that the law "does not

authorize a carrier to depend upon others to discharge its obligation * * * in payment of wages imposed thereby", and that "each employee concerned" as a protest against the *method proposed* * * * (because) * * * the carrier has acted * * * without authority in law * * *.

The red caps' letter of October 24th eliminating therefrom the statement which quoted the law and which gave their opinion as to the legal effect of the law as applied to the facts, is boiled down to the proposition that the red caps *"protested"* against the *"method"* proposed, apparently with the view that the company *would not be entitled under the law to use the income* to be derived from the services which the company would
43 thereafter render to the public at its own cost and expense. They both did agree that the red caps were employees of the company and that if the red caps did thereafter "engage in the handling of hand baggage", etc., as such employees, then, in consideration of the performance of such labor, the company would pay and the red caps would receive wages not less than the minimum requirements set out in the Fair Labor Standards Act.

The Red Caps under the undisputed facts viewed in light of the unquestioned law, in effect said:

(1) That you are the employer and, if we continue working for you in the future, we are your employees.

(2) That our contract of employment is terminable at the will of either party; and for such reason you may discharge all of us now; that you are not obligated to continue us in your employ and we are not obligated to continue in such employment.

(3) That a new employment contract, express or implied, is necessary for you have clearly advised us that our old contract is at an end.

(4) That is the employer, if we continue in your employ, you do have the legal right to set and prescribe for the future our hours of work and rate of pay so long as our wages are not less than 25¢ an hour; and you also have the legal right to control and supervise us in the means, method and manner in which we shall do our work.

44 (5) That, if we work for you in the future and you pay us to do this work for you, our efforts belong to you and the work we do or service we perform *is done and performed by you.*

(6) That when you perform a service through your employees you are entitled in law, equity and fair dealing to the income to be derived from such service performed by you and at your expense.

(7) That being the employer, you may devise and use any system of accounting with reference to income and payment of wages as to you may deem advisable and proper so long as you do not violate the spirit and intent of the Fair Labor Standards Act, which requires that we shall receive as wages for our work for you a sum not less than 25¢ an hour.

However, it is contended in this suit by the representative of the Red Caps that the notice of October 22, 1938, was not binding; and that in the absence of an acceptance of the conditions of such notice, the tips received by the Red Caps since October 24, 1938, are the property of the Red Caps, and could not be used by The Terminal Company in the discharge or payment of wages.

We have briefed herein our answer to these two propositions, asserting first (under Assignments of Error I and II of Defendant's Motion for New Trial) that the notice of October 22, 1938, was binding upon them and formed the basis upon which the Red Caps
45 worked from October 24, 1938, to March 6, 1940; and second (under Assignment of Error III) that *regardless* of the question of acceptance, the tips collected by the Red Caps after October 24, 1938, were the property of and were owned and controlled by The Terminal Company, which company had the lawful right to apply such tips against wages or dispose of such tips in any manner it saw fit.

Other grounds are set up in Defendant's Motion for a New Trial and are not intended to be waived hereby; but this informal brief is confined to the two Propositions mentioned.

I.

The notice of October 22, 1938, from the Union Terminal Company to the Red Caps, followed by the action of the Red Caps in continuing in the employment of the Union Terminal, fixed the status of tips as wages, despite the so-called protest of October 24, 1938.

The notice of October 22, 1938, provided that "in consideration of your *hereinafter engaging* in the handling of hand baggage, etc. . . . it will be necessary that you report daily . . . the amount received by you as tips or remuneration for such services. . . . You are *privileged* to retain, *subject to their being credited on such guarantee* . . ." At the same time The Union Terminal Company guaranteed to each Red Cap "compensation,

which together with and including the sums of
46 money received as above provided will not be less than the minimum wage provided by law".

If any prior agreement existed between The Terminal Company and the Red Caps with reference to the ownership of tips, this notice definitely terminated it, as the Red Caps were advised that in the event they thereafter continued in the employ of The Terminal Company, through which employ they were placed in position to collect tips, The Terminal Company would not agree any longer that such tips could be unconditionally retained as the property of the Red Caps. The whole notice clearly contemplated that "in consideration of (the Red Caps) thereafter engaging in the handling of hand baggage", The Terminal Company would guarantee a stipulated wage, but that ownership and control of tips should be in The Terminal Company to be applied in the payment of such wage. The situation of the Red Caps was no different than would have been that of any person newly seeking employment or theretofore not employed by The Terminal Company. They were presented with a unilateral offer of employment outlining definitely the conditions thereof. The notice clearly said to the Red Caps that if you hereafter engage in the handling of hand baggage, you will do so under the following conditions, to-w.t: etc. When the Red Caps thereafter engaged in the handling of the baggage, their action in so doing automatically accepted the only conditions of employment held out to them.

47 Certainly The Union Terminal Company had the legal right on October 22nd to offer employment for services *thereafter to be perfotmed*, on whatever conditions it saw fit, so long as its offer did not constitute a violation of the law. The notice of October

22nd stipulated in effect that thereafter tips should be owned and controlled by The Union Terminal Company. There is no provision in the Fair Labor Standards Act forbidding an employer from offering employment under the condition that tips received in the course of the employee's work should be owned and controlled by the employer. Such a provision would have been unconstitutional. See Ex Parte Farb, 174 Pac. 320, wherein it is said:

"Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditures of one's earnings.

The statute under review is void because it is in conflict with the due process provision of the Constitution of the United States, etc." (U. S. Supreme Court authorities cited.)

The failure of the Act to include tips in the definition of wages does not purport to be and cannot be construed as an implied prohibition of the right of an employer and employee to contract covering the ownership of tips, or as a prohibition of the right of an employer to offer employment conditioned upon the ownership and control by him of tips received in the course of employment.

48 Any such attempted prohibition would itself have been unconstitutional. The Red Caps are employees of The Terminal Company. The service that is rendered *by The Union Terminal Company* through its Red Cap employees is paid for by tips. So long as The Union Terminal Company complies with all laws, nothing prohibits it from offering employment conditioned on the exercise by it of ownership and control over the payment made by the public in the form of tips for the service rendered the public by *The Union Terminal Com-*

pany through its employees; nothing prohibits it from going to the extreme of forbidding the acceptance of any tips at all, just as is done in some restaurants. There was therefore nothing in the Fair Labor Standards Act *prohibiting* The Union Terminal Company from offering to certain individuals employment under the terms of the instrument of October 22, 1938.

But, it is argued, the notice of October 22nd was an offer which was rejected by the so-called letter of protest written on October 24, 1939, by the Chairman of a Brotherhood claiming to represent the individuals to whom an offer of employment had been made. If it is to be claimed that such letter of protest clashes with and overcomes the action of the Red Caps in actually *thereafter* "engaging in the handling of hand baggage" in the employ of The Terminal Company and in carrying out all of the conditions of the offer of October 22nd including the receipt of pay (the possible correctness of such claim, considered from any angle, of course being denied by defendant) certainly the terms of the letter of October 24th should be analyzed carefully.

49 The first paragraph of the letter reads:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22nd, 1939, and which was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

There is nothing in this first paragraph which suggests a rejection of the terms of employment offered the Red

Caps by The Terminal Company; it is simply an undertaking to summarize the contents of the notice of October 22nd.

Then the second paragraph of Mr. Pickett's letter of October 24th reads:

"In other words the carrier contemplates crediting tips and other monies paid its employees by persons other than itself to relieve itself of the obligation imposed by the following quoted section of the law:

"Fair Labor Standards Act;

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour."

50 This is simply a further attempted summary of the notice of October 22nd, accompanied by a quotation from the Fair Labor Standards Act. It says nothing about any employee rejecting the offer of employment.

The next two paragraphs of Mr. Pickett's letter read:

"The above section of the law which is quoted in part for the purposes of this notice, clearly sets forth that every employer who engages in commerce shall pay to each of his employees during the first year after the effective date of the law, 25¢ per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby."

These two paragraphs contain merely an undertaking to construe the Act, a statement of a conclusion as to what the Act means, not a rejection of an offer of employment.

The letter then concludes:

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein."

51 Here is the "protest" against *the method* proposed by the carrier to comply with the law and an expression of opinion that the law will not be complied with if The Terminal Company's proposal is put into effect. It contains nothing even implying that the employees reject the notice and nothing in conflict with the subsequent *action* of the employees in working for a year and a half under and in accordance with the notice, but simply is an expression of view that the terms set out in the notice do not comply with all the requirements of the Fair Labor Standards Act.

The letter does not say "we refuse to proceed under the notice", but at most says in effect: "Even though we do proceed under the notice, we do not construe it as a

complete compliance with the Act and we do not waive our rights under the law". (This is the reservation or contention referred to in subsequent correspondence and in Rule 16 of the Working Agreement of January 1, 1940, the latter simply providing that in the event of discharge and reinstatement of an employee, he would be reimbursed for any money losses should it be legally determined that he was entitled thereto "under the provisions of the 'Fair Labor Standards Act'.". In adopting Rule 16, it is clear that neither The Terminal Company nor the Red Caps conceded that the legal position of the other was correct. Certainly The Terminal Company continued to operate under the terms of the October 22nd proposal, considering that such proposal was in full compliance with the law; and the Red Caps did not deny that they were working and receiving pay under the proposal of October 22nd, but at the same time they
52 did not waive their contention that the proposal was not in full compliance with the law.)

The men proceeded thereafter to work under the only conditions of employment offered them. Can their *action* be *ignored*, and can it be said that they were working under no contract at all; or is it not more reasonable to say, giving full force to every word in the letter of October 24, that the men in "*therafter engaging in the handling of hand baggage*" accepted the notice and the work offered thereunder but took the position that it would not fulfill defendant's obligation under the law and that they reserved by protest any rights given them under the law?

Of course the men are entitled to the full protection of the law; and if the terms of the notice, as contended by Mr. Pickett in his letter of October 24, were not in compliance with the law, it does not deprive the Red

Caps of any rights, under the law. But is it not clear that the letter of October 24 did nothing more than express a view as to whether or not the proposal of October 22 was in complete compliance with the law and reserve to the men the full protection of the law? Certainly the letter does not purport to reject *any lawful* part of the proposal. So if the letter of October 24 is to be given any weight at all in the face of the overt *action* of the men in "thereafter engaging in the handling of hand baggage", is it not effective at most *only* in so far as it is accurate or correct in the view that the notice
53 of October 22nd does not fulfill the obligations imposed by the terms and provisions of the Fair Labor Standards Act?

In the last analysis therefore, giving full force to the letter of October 24, are we not back to the proposition: Is there anything unlawful about a notice by an employer to an employee that tips collected by such employee in the course of his employment shall belong to and be controlled by the employer? This question has already been answered herein.

But if Mr. Pickett's letter of October 24th can be construed, not as an undertaking to express a view as to the legal effect of the notice of October 22nd plus a reservation of the full protection afforded by the law, but as an outright rejection of employment as offered by said notice and a refusal to work thereunder, we would still insist that the action of the men in actually "thereafter engaging in the handling of hand baggage" was of more controlling effect than any "protest" of October 24th, and operated as an acceptance of the unilateral offer of October 22nd, 1938, the only offer of employment ever made by the Terminal Company.

We have already called the Court's attention to the case of *Shuppan vs. Peoria Railway Terminal Co.*, 30 F. (2d) 569, which appears to be exactly in point. Briefly, in the latter case, the Terminal Company found it necessary to take a definite stand with its employees relative to the matter of wages. First, the employees
54 were told that they could take their choice between one of two courses: accept a certain wage, or in the alternative take the income of the company after deduction of the cost of operating the company. Within a few days after these conditions were laid down, the employees held a meeting and decided they *would not accept* either proposal, and they so advised the management of the Terminal Company. Shortly thereafter the general manager of the Terminal Company posted a bulletin outlining the manner in which wages would be handled. The Employees' Committee then wrote the manager again protesting and stating definitely that they *would not accept* the terms of employment as set forth in the Terminal Company's bulletin. Nevertheless thereafter the employees, as did the Red Caps in our case, continued to work, and, as stated on page 569 of the opinion by the Seventh Circuit Court: "The company then began to pay the employees as announced in the bulletin". After letting a year or so go by (as they did in this case) the employees brought suit for the difference between the wages received by them and the wages they claimed they were entitled to under their previous employment and some ruling of the United States Labor Board. The Court held that despite their written notification that they would not accept the terms of employment offered, the employees *by remaining in the employ of the company*, accepted the company's proposal and estopped themselves from thereafter taking another position. The Court used this language on page 570:

"Offered the alternative of accepting a wage cut or leaving the service, the men reported apparently to the effect that the wage cut was not acceptable. Still no one left the service. By remaining in the employ of the company they manifested more positively that the proposal that they leave the service was not acceptable."

(It might be stated here that in the Shuppan case nothing was actually said in the employer's bulletin about leaving the service if the terms of the offer of employmen were not acceptable.)

"Only the company could fix the wages of those who were willing to work for it. Only the employees themselves could say for whom they would work. If either proposed terms of employment unacceptable to the other, nothing prevented the dissatisfied party from terminating the relationship. The company having made it clear what wages it would pay its employees, those who took employment with it thereafter *or those who continued in its employment*, though mistaken as to the power of the company to fix wages, *must be deemed thereby to have accepted the only terms upon which such continued employment was offered.*" (Italics ours.)

The plaintiff in this case, by taking the position that his cause of action was preserved by the "protest" of October 24, 1938, says in effect that the Red Caps continued to work thinking that under the law the Terminal Company had no right to exercise ownership or control over the disposition of tips. But under the law the exercise of such right was not and could not have been prohibited; and the Terminal Company on October 22, 1938, advised each Red Cap in clear language that he could thereafter work on its premises and engage in the handling of hand baggage and col-

lect tips for such service *on the condition* that such tips be accounted for and be applied upon a wage which the employer guaranteed to pay him. While the employees under date of October 24 may have expressed the view that the Terminal Company was not complying with the law, and might even, for argument's sake, be said to have refused on October 24 to work under the conditions laid down, nevertheless on October 25 and ever since *they have worked;* and, if the decision of the Circuit Court of Appeals in the Shuppan case is the law (and we know of no authority contrary thereto) "the (Terminal) Company, having made it clear what wages it would pay its employees" (or having made it clear to whom the ownership and control of tips would belong) "those who took employment with it thereafter, or those who continued in its employment, *though mistaken as to the power of the Company* to fix wages, must be deemed thereby to have accepted the *only terms upon which such continued employment was offered*".

Moreover in addition to the Shuppan case, there is a recent definite statement of the law in Texas on the question. We submit that on the issue as to whether or not there was a contract consummated in this case, the Texas law controls though the cause in other respects involves a federal statute, particularly so when the only reported federal authority is in agreement with the Texas law. (This case was not called to the Court's attention in the argument at the close of the evidence.)

57 The case, setting out the Texas law by the Fort Worth Court of Civil Appeals, no writ of error noted, is *L. G. Balfour Co. vs. Brown*, 110 S. W. (2d) 104. In that case an employee by cross action sought to recover commissions as compensation for his services based on his original contract of employment. The em-

ployer defended on the ground that the original contract had been changed as to commissions to be paid for the employee's services by its notice of such change given to the employee, notwithstanding a protest of such change by the employee. The Court's opinion clearly sets out the position of the parties and its holding so we quote rather than discuss:

"The determination of this proposition is largely the *controlling issue* in the controversy. The substance of the proposition is that the parties operated under a written contract until August 22, 1930, which provided that appellee (employee) should receive for his services commission on his own sales, and in addition thereto a special bonus of 10 per cent on the net prices and also a bonus of 10 per cent of the net prices on salesmen working under his supervision, and that the contract also provided that such conditions existed so long as the employee's services were satisfactory to the company; but that on August 22, 1934, the appellant (employer) *advised* appellee, in writing, the bonus *thereafter*, under said contract, *would be* reduced to 5 per cent on subsalesmen's sales and 2 per cent on appellee's own sales; in the same letter agreeing to wipe out a deficit for which appellee was responsible; that appellee *protested the change* made by appellant in the contract,
58 but, *having reached no mutual agreement* about the matter, the appellee continued to work for appellant until in June, 1935, when he resigned, receiving compensation as provided in appellant's letter of August 22, 1934; therefore *he was not entitled* to claim, when sued, settlement under the written provisions of the contract, but is *bound by the change* made by appellant in its letter of date August 22, 1934.

"A stipulation in the contract reads: This contract may be determined at any time at the option of the com-

pany upon a breach of any of the conditions of this contract and may be terminated at any time during said term by either party, for any other reason, upon thirty days notice in writing of the intention to do so first being given to the other party, or by mutual consent in writing of the parties hereto. * * *'

"The contract, the agreement of ratification, and the addenda to each perhaps conveyed to the interested parties the nature of appellee's employment, his duties and compensation to be received until in August, 1934, *when the appellant claims to have effectively terminated the original contract and made a different one* with appellee as respecting compensation.

"Upon the soundness of this contention depends whether or not the Trial Court rendered a proper judgment in the case. We believe the Court reached an improper legal conclusion when he found at paragraph 7: 'Inasmuch as the preponderance of the credible testimony showed that A. H. Brown did not agree to a modification of any of the contracts existing between himself and plaintiff, I conclude said contracts were not modified in any respect.'

59 "The original contract could be terminated by either party in the manner therein set out; and, while appellant did not, in so many words, declare its intention to terminate the contract and give the thirty days' written notice to appellee, yet its letter of August 22, 1934, *had that effect*; at least it was a declaration amounting to a breach of the terms of the contract in the matter of compensation to appellee.

"When appellant made this change in appellee's compensation at variance with the contract, he was called up

to elect whether he would accept the modified contract or rely upon the old and sue for its breach. He could not continue his services under the new or modified contract *and later rely* upon the terms of the old; his election must have been made within a reasonable time after the condition arose. Appellee continued in appellant's services with full knowledge of the new schedule of commissions and bonuses provided for in the letter of August 22, 1934; *but of course this continued service was not without protest; however, an earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service.*

* * * * *

"The Court found as a fact that appellee did not at any time consent to any modification of the compensation due him under the terms of the original contracts, and that the terms of said contracts in all respects continued in full force and effect until appellee resigned in June, 1935. It was upon this finding of facts that the (trial) Court based his conclusion of law that the contracts remained in effect entitling appellee to the compensation provided in the original contracts. *In this we think the Court erred.*

60 "Appellee testified that, after receipt by him of the letter of August 22, 1934, from appellant, his net commissions were figured on the basis of that letter; that he continued to work for appellant thereafter until in June, 1935, when he resigned. We think this shows an election on the part of appellee to ratify, though reluctantly, the modified or changed contract as embraced in appellant's letter.

* * * *

"The judgment rendered in this case was based upon the theory that appellee, not having agreed to a modification of the contract, was entitled to recover commissions and bonuses based on the provisions of the original contracts, and for the reasons stated and under the authorities cited we think the Court erred in these conclusions of law applicable under the facts."

Just so in the present case, when defendant served the notice of October 22nd on the Red Caps they were called upon to elect whether they would accept the change or treat the relationship as ended. "An earnest protest was not sufficient, he (they) was called upon to act, this he (they) did by continuing in service." We believe the above decision to be squarely in point with out facts here, and it being the Texas law should control the decision here on the question as to whether or not the Red Caps, in law, may now disregard and not be bound by the terms of employment set out in such notice of October 22nd.

61 Suppose that, in place of the letter of October 24, which merely undertook to place an interpretation on the Fair Labor Standards Act and to reserve to the Red Caps all the rights which the law gave them, the Red Caps had gone much further and had each in person on October 24 stated to the Terminal Company that they would not accept the employment offered. The Terminal Company on its part made no change in the terms of its offer of employment, and suppose that without any further communication, the Red Caps or some of them turned up on October 25 and "engaged in the handling of hand baggage" and continued so to engage thereafter. Could they sue the Terminal Company thereafter on quantum merit or some other theory, or would it not be held, as in the Shuppan and Balfour cases, that their

action was contrary to their expressed intention, such action was controlling and they "must be deemed thereby to have accepted the only terms upon which such continued employment was offered?"

What exempts the Red Caps from the ancient rule that one cannot accept the benefits of a contract and at the same time reject its burdens? Interpreting the letter of October 24 in its most favorable light to the plaintiff, do we not have this situation: The Terminal Company made only one offer of employment, that of October 22, 1938. That offer contemplated that acceptance thereof would be by action, namely "hereafter engaging in the handling of hand baggage". The Red Caps thereafter so engaged, but, under plaintiff's theory, they said in effect: "All right, we will and do accept
62 the privilege of working on your premises and the advantages accruing thereto; we will and do accept your guarantee of $60 or $70 a month and your checks issued thereunder; but we decline to accept some of the other conditions of your offer." In other words, we will take the work and take your money and all other advantages held out to us, but we reject anything that we may consider a burden. But the offer of October 22nd was a *whole* offer, not a *divisible* one. The most the Red Caps could have done *(and the only thing they did or tried to do in the letter of October 24)* was to refuse to be bound by any *unlawful* condition in the offer and to reserve to themselves the full protection of the law. Of course, they are entitled to that protection anyway. So again we get back to the proposition that inasmuch as there was nothing unlawful about the notice of October 22, 1938, no violation of the Fair Labor Standards Act, only the lawful exercise by the Terminal Company of its right to own and control the tips received in connection with the performance of a service by it through its em-

ployees, accompanied by a guarantee of the payment of the full wage provided for in the Fair Labor Standards Act, such notice was accepted by and is binding upon the Red Caps involved herein.

II.

Even in the absence of an agreement therein between the employer and employees the income received from the patrons in payment of the service rendered such patrons belonged to the company as a matter of law.

63 The law always views any situation from a standpoint of substance rather than form. Here the employees were not and could not rightfully be in disagreement on matters of substance, namely, those matters enumerated in the numbered paragraphs on pages 6-7 supra, but disagreed only on a matter of form that is the "method" of payment of wages. The reason given by them that the form, i. e., the method of payment was wrong was that "the law does not authorize the carrier (the employer) to depend upon others (the passengers) to discharge its obligation * * * in the payment of wages (to its employees) imposed thereby". *It is an unerring law, that can "withstand the erosion of time", that no business may survive unless its income exceeds or at least equals its expense; that its income must be derived from its patrons in exchange for the commodity it sells to or the service it performs for such patrons. *Every business* that survives, disregarding the mechanics or methods used, *depends upon others* to discharge its obligation in the payment of wages to its employees". To say that an employer cannot use income paid by its

*Words in brackets inserted by us for emphasis and clarity of application.

patrons, in return for services performed by the employer for such patrons, in the discharge of its wages is to say that it must pay same out of its capital assets, if any it has, until they are exhausted and then it can no longer continue in business and therefore can no longer pay wages. This doctrine if followed would create unemployment in catastrophic proportions. To seriously

64 consider even for a moment this principle, advanced by said employees as the basis for their protest, compels the inevitable conclusion that all employers, even this one, had the right to depend upon their patrons for income with which to discharge their obligations in the form of wages to their employees; and that the "protest" was illogical, unsound and ineffective.

Assuming, however, for the sake of argument that as a result of the protest there was no agreement, did this income, *in the absence of an agreement thereon*, between the employer and the employee, belong *as a matter of law* to the employer or the employee?

There is nothing in the Fair Labor Standards Act or any other law which prohibits an employer from having the ownership of and exercising the control of all income derived from the prosecution of its business. There is nothing in the Act which compels an employer to continue in force any contracts theretofore existing between the employer and employee pertaining to the employer's property, to-wit, the income from its business. There is nothing in the Act requiring employers to continue any particular employees in its employment after the effective date, and there is nothing in the Act requiring employees to continue in past employment beyond the effective date of said Act. There is nothing in the Act which gives an employee the right to convert as

his own, to the exclusion of his employer, funds
65 coming into his hands, received by him in the
course of his employment and paid to him for
services rendered by his employer through him.

The employees demanded that the law prescribing minimum requirements be satisfied and the employer expressed its intention to comply with such minimum requirements. So long as the employer does comply with such minimum requirements, the employee has no *legal* right to oppose any "method" used by such employer in such compliance. If the tips, in absence of an agreement, belong to the employer as a matter of law, the employees has no legal right to "protest" against the employer's exercise of ownership over these tips.

Assuming for sake of argument only, as plaintiff contends, that there was no agreement between the employer and employee as to the ownership of these tips after the receipt of the October 22, 1938, notice, the law will regard the funds, so received, as belonging to the person or corporation that in law has performed the service for which the tips were given. The tips were given in consideration of the service performed in carrying bags and similar service. The issue is thus narrowed down to the legal question as to who has performed that service. An answer to that question should solve the problem as to the ownership of the tips.

The company had the legal right, even in the face of a protest, to determine whether or not it would customarily make a charge for the services it intended to render to the public after October 22, 1938. It de-
66 termined it would make a customary charge in
this way: it said in its letter, in effect, that we
recognize that the general public has considered in the

past that it is not entitled to receive Red Cap service without paying for it; and that the public has recognized that there is a charge for it by customarily paying a sum commonly called a "tip"; that, since the public is accustomed to this charge, we here and now adopt that same method of payment by the public as our regular way of charging for our services; and therefore, since we are making this charge, you will collect our charge for us, and when you do so same is in our possession constructively, because it is our charge and you must account to us for our funds. Periodically you will owe us so much money and we will owe you so much money, and upon such accounting we will settle any deficit with you; that such shall be in payment of your wages. Thus upon such accounting the company's charges are then released from its constructive possession to the unconditional ownership of the Red Cap and same is released as payment of wages. The result is the same, under this "method", as would be the result if the employer had required the manual delivery to it periodically of all revenue and it had in turn manually paid the employee his wages with such funds or part thereof (Short, et al, vs. Rochester Taxicab Company, et al, 164 N. Y. Supp. 904). There was no necessity for an acceptance by the Red Caps of the above directions from its employer. The employer had the right to make the charge and to set up the mechanics for its collection and accounting.

67 This suit is bottomed squarely upon the fact that the Red Caps are employees of this company. If they are not employees, then the company certainly does not owe them any wages. The "protest" written by their representative asserts that they are employees of said company. The liability sought to be imposed on this company is by virtue of the fact that it is the employer and has employed these Red Caps to work

for it. The character of the work that they do is carrying baggage and similar assistance to passengers passing through the station of this company. They charge that they perform said service for and on behalf of this company as their employer. They therefore charge that this company, through them as its employees, performs that service of carrying that baggage and otherwise assisting those passengers. They charge that in consideration of the performance of that service by this company, through them as its employees, the persons receiving that service pay therefore sums of money commonly termed "tips". They do not contend that any other consideration is paid to the company or that these "tips" are paid to the respective Red Caps by the respective passengers over and above a customary charge paid to the company or for any other reason other than the fact that the persons making such payment have received a service performed by this company.

Plaintiff contends that in the absence of an agreement between the employer and employee the revenue derived from the service performed by the company be-
68 longed to the employee and not to the company. The company says that such revenue being the sole and only revenue derived from the services which it performed and since it was obligated to pay and intended to pay the employees for performing that very service, such income constituted company income and was subject to its control and disposition; and that when such customary charge is paid to the Red Cap, under such circumstances, it is *constructively* in the possession of the company.

Let us analyze some adjudicated cases concerning "tips", two of which have heretofore been cited to the Court and relied upon chiefly by the plaintiff and some of which

have not heretofore been cited, and consider the underlying reasons upon which these decisions are based and then apply said underlying reasons to the peculiar facts in this particular case and see what result is reached.

In Zappas vs. Roumeliote (Supreme Court of Iowa), 137 N. W. 935, cited by plaintiff, the minor plaintiff had worked as a bootblack under a salary contract and the wages agreed upon were paid him. During his two year employment he turned over to his employer daily all tips. He brought action to recover back such tips and recovered. The jury found "that there was no contract between the parties as to tips, and that the tips were personal gifts to the plaintiff by patrons of the house", which finding the Appellate Court held was sustained by the evidence. The Court held:

69 "We think the Court was right in instructing that the plaintiff would be entitled to *any gifts* in the way of tips, *over and above the regular charge for the service performed*, given to him by patrons of the defendant's place. * * * The plaintiff *did prove* that the tips were given to him as a gratuity, and were not intended for the defendant; and that was all that the law could require of him. * * *. The plaintiff was a young Greek, who had just come to this country. He knew nothing of our language for some time, and did not know for a year that tips given to him were intended by the donors as *gifts* to *him*." Affirmed.

In Ex Parte Farb (California Supreme Court, 174 Pac. 320, 3 ALR 301) the point for decision was the constitutionality of a California statute making it a penal offense for an employer to contract with his servant that tips received by the servant would belong to the employer. The statute was held unconstitutional by a ma-

jority Court (six Judges) with a dissenting opinion by one Judge. The basis for the majority holding was that the statute unconstitutionally interfered with the right of the parties to freedom of contract. No discussion or holding is contained in the opinion as to the ownership of tips in the absence of an agreement except it does refer to with approval the Iowa decision just above. The dissenting opinion in the Farb case, in criticizing such a contract as was condemned by the statute, uses this language:

"* * * by its terms the employer, as the proprietor of the place or service in connection with which the tip is received by his employee, is not entitled to it, *since* he
70 is *already fully paid* for whatever he furnishes *by his regular charges*, which *cover and compensate him* for the fullest measure of promptness, fidelity and courtesy toward his patrons on the part of his employees. To permit him to *exact more* is not only to legalize *an overcharge*, but [illegible] to encourage discriminations in the price and quality of his service as between those of his patrons who do and those who do not submit *to the overcharge*.

In Polites vs. Barlin (Court of Appeals of Kentucky), 149 S. W. 829, cited by plaintiff, Barlin, the employer, operated a shoe shining parlor and the employee, Polites, fifteen years of age, was employed to shine shoes and clean hats. He worked five years and ten months and sued to recover $575.00, the amount alleged to have been received by him in tips during this time and paid by him over to his employer by mistake under the belief that they belonged to the employer. The Trial Court sustained a demurrer to his claims for the tips paid. The petition contained the allegation that "it was the habit of the people who came into appellee's place of business

* * * to give the particular employee who did the work a donation of money, commonly called a "tip", which was a personal gift to the employee, *in addition* to the *price charged* by appellee for the work done; * * *"

The Appellate Court held that

"It clearly appears, from the amended petition * * * that ~~the~~ money which appellant received as tips was a personal gift to him, and he, and not appellee, was entitled to receive ~~it~~; that appellant through a mistake and through a misapprehension as to his right, turned
71 the money over to appellee. If this be true, he is entitled to recover; for it is well settled in this State that, where money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which in law, honor, or good conscience was not due or payable, and which ought not to be retained by the party to whom it was paid, it may be recovered."

The Court held that, under the allegations if supported by proof, plaintiff was entitled to have his case submitted to a jury, and reversed the Trial Court's action on the demurrer.

In Short, et al, vs. Rochester Taxicab Company, et al, In re London Guarantee & Accident Company (Supreme Court, Appellate Division, Third Department, 163 N. Y. Supp. 904) tips were added to the regular salary of a taxicab driver in arriving at his compensation rate under the compensation act. It was stipulated that:

"There was a custom existing in the City of Rochester whereby users of taxicabs, *upon paying their fare*, gave to the drivers gratuities or tips, *which is an amount in*

addition to the fare, and for the personal use of the driver; that such custom was known to the employer at the time he employed Sloat to enter his service; that the average amount of tips so received * * * was 85¢ per day, which sum he was allowed to keep for his own use, *and was not required to account* to his employer for same."

The opinion reflects:

"It is urged that these tips were received, not from the employer as wages, but from the patrons of the taxicab, as a gratuity or gift to the driver. * * * The
72 employer and employee knew that 85¢ per day would be received from tips, and clearly the compensation paid by the employer was based on that assumption. *If the employee* had turned the tips over to the employer, *as probably would have been his duty in the absence of an understanding to the contrary*, the wages of the employee would have been $17.10 a week. If the employee receives from the employer $12.00 and retains the $5.10 in tips, he is getting through or from the employer $17.10 a week; and if the employer paid the employee $17.10 a week, and the tips were turned over to the employer, *the result to each would be the same.* Neither the employer nor the employee contemplated that the employee should receive but $12.00 for his services; each expected that he would receive an average of $17.10 per week.

"The employee could not have received the tips if the employer had not put him in the way of receiving them, and we may well conclude that the tips were an advantage *received from the employer* similar in effect to board, lodging, or rent furnished in addition to the money wages paid * * *. The usual tips have come to be considered a part of the cost of the entertainment

at a hotel or upon a sleeper or public conveyance, and it is realized both by the person paying and receiving them *that it is a part of the wages*, which the employer compels the person served to pay. In effect, therefore, the employer and not the employee alone, is benefitted by the tips usually paid * * *. The whole theory of tipping, as at present made in order to get reasonable service, and is an exaction made or permitted by the employer, *so that his patrons shall help him pay the wages* which is
73 fairly due from him to his employee. The custom and the manner in which the payment of tips is enforced and practiced leads inevitably to the conclusion that *in substance* the tips received *are a part of the wages* of the employee, and are advantages received by the employee from the employer as a part recompense for services rendered * * *. Award affirmed.

In Bryant vs. Pullman Company (Supreme Court, Appellate Division, Third Department, N. Y., 177 N. Y. S. 488) it was held that tips received by a Pullman Car porter are understood by the porter and the company to be part of his "wages" and can be considered as such in determining the compensation to which he is entitled for injuries.

The Court said:

"It is urged, however, that the award rested upon the wrong basis as to tips received by the porter, *which were treated as a part of his wages*, and an ingenious, but unsuccessful attempt is made to distinguish this case from Sloat vs. Rochester Taxicab Company, 177 App. Div. 57, 163 N. Y. Supp. 904. It is urged that in that case it was understood that tips were to be a part of the compensation. The facts in this case overwhelmingly point to the same result. * * * *Such is the common understanding.* The award should be affirmed."

In Gross' Case (Supreme Judicial Court of Maine, 166 Atl. 55) the issue on appeal was whether, in ascertaining the average weekly wages or earning of a waitress, tips received and retained by her should be considered. It was undisputed that, under her contract of em-
74 ployment, she could retain her tips. The Board included her tips and found her average weekly wages to be $17.13. After considering and citing from many compensation acts and the decisions thereunder under which tips were included in the computation to arrive at the average weekly wages of the employee, the Court pointed out:

"A further provision of our act is that in determining the compensation to be paid, *benefits received from any other source than the employer* shall *not* be taken into consideration. Section 18."

The Court then quoted from the reasoning of the Court in the Sloat case, supra, to the effect that "the whole theory of tipping" is that "* * * patrons help him (the employer) pay the wages which is fairly due from him to his employee." Appeal dismissed.

Thus it appears that in the Zappas case the employer had a regular charge for the services which he perform through the employee, which the employer had received; and that the employee *proved* "that the tips were (a) *over and above* the regular charge, and (b) were given to him *as a gratuity* and were *not intended* for the employer". In the Farb case, the language in the dissenting opinion reflects that *in the ordinary* tipping cases, where the employee is permitted to retain the tips, "the employer is not entitled to it, *since* he is *already fully* paid for whatever he furnishes by his regular *charges*, which cover and compensate him. * * * To permit him to exact

more is * * * to legalize *an overcharge*". In the Polites case, which went off on the pleadings, the em-
75 ployee pleaded that "the tips were a *personal* gift to him" and that same was "*in addition to the price charged*".

From these cases, if they are to be followed as sound law, the legal rule is deducible that, in the absence of an agreement with his employer pertaining to "tips", the employee *may recover when he pleads and proves* that

(a) The employer has a customary charge for the service which has been paid over to such employer as compensation for the service performed.

(b) The sum in controversy is *over and above* that regular charge.

(c) The sum in controversy was a gratuity to the employee, and was not intended as payment for the service rendered by the employer through the employee.

The reasons upon which the decisions were based in the decisions cited by plaintiff, Zappas and Polites cases, are entirely lacking here. If the reasons for the rule are absent here certainly the holding should not be the same.

Plaintiff here has wholly failed to prove ownership of such funds in the employees and therefore did not come within the rule which is deducible from the two cases chiefly relied upon by him. He failed to plead
76 or prove that there was paid over to this company any sum whatever to compensate it for the services it has admittedly rendered to said passengers.

He did not plead or prove that the $38,626.99, which he admits was collected by said Red Caps from patrons at and about defendant's terminal for the period involved, was a sum over and above the regular charge. He failed to plead or prove that this sum of $38,626.99 was intended as a gratuity to the Red Cap and was intended as payment for the services rendered by the company. Not only has plaintiff failed in these material respects, but the uncontradicted evidence, together with common knowledge on the subject, is that in this particular case, which is entirely different from the bootblack cases, the amount which the patron pays in each case, commonly called "tip" is the customary and only charge, and such customary charge, even under the Zappas and Polites cases belongs to the employer as a matter of law in absence of an agreement. The exact amount of the charge in each instance is left to the individual patron; but whatever amount is paid in each case, *same* is a *charge*, customarily expected and paid, for the service rendered by the company *in the particular case.* It is not intended by the patron as a pure gratuity but is intended as a full payment for the service rendered, whoever may be the person rendering it. If the company does not receive such payment, through credit or otherwise, it is deprived of the compensation which the patron intends to be in payment for the service furnished to the patron by the company; and is deprived of its customary charge
77 for such service, as provided for by its letter of October 22, 1938, and which charge it had a right to make provision for.

The company's position, that under the peculiar facts here involved, the revenue received from the service rendered by it through the Red Caps, belongs to it even in absence of an agreement, is sustained in the Short case, supra, page 34, wherein the Court held:

"If the employee had turned over the tips to the employer, *as probably would have been his duty in the absence of an understanding to the contrary*, the wages of the employee would have been $17.10 a week * * * (also * * * in substance the tips received are a part of the wages of the employee * * *."

Also in the Gross case, supra, page 36, the Court held that the "whole theory of tipping" is that patrons help the *employer pay the wages* which is fairly due from him to his employee.

Since this company is the one that performs the service and the sums of money, prescribed by the company in its October 22nd letter as its charge, were paid in consideration of the performance of that service they belong as a matter of law to the company. The company prescribed this charge and claimed its ownership of these funds in the October 22nd letter and exercised its right to ownership of said funds by *prescribing* the "method" of the disposition of its funds. The failure of the employees to agree that these funds belong to the company did not make them any the less property of the company. The only way they could be owned by or belong to anyone else *other than the company* would be by an express agreement to which the company was a party. No such agreement existed after October 22, 1938. The law will not vest title to these funds belonging to the company merely because the Red Caps refuse to concede, admit or agree that the funds did belong to the company. Boiled down and stripped of its verbiage, the "protest" of these employees, interpreted most favorably to the plaintiff, simply said in effect "we won't admit or agree that these tips shall be subject to your control and disposition". That part of the protest insisting that the Wage and Hour Statute

78.

be complied with was so much surplusage as Congress commanded that and the letter did not make it any more imperative upon the company. In other words, the lack of an agreement as to the ownership of these funds, if there was any such lack of agreement, and the resulting right flowing from ownership, the right to control and dispose of them, gives to the funds that ownership where it would necessarily lie *in the absence of* any agreement pertaining to such ownership; that is, the funds constitute income paid by the persons receiving a service rendered by this company in consideration of the furnishing of such service. The money paid was collected by this company's employees, authorized to collect it by the company, for and on its behalf. The letter of October 22, from the company to the employees, authorized them to so collect it for and on its behalf. It is the company's money constructively in its possession but
79 in the actual possession of its agent, the Red Cap. Rather than go through the unnecessary mechanics of manual delivery of the company funds to the company and then manual delivery of them back to the Red Caps, making a round trip, the same legal effect is accomplished in a simpler manner by permitting such Red Caps to retain such company funds as wages or a payment on wages.

While the foregoing, in defendant's opinion, is sufficient answer to plaintiff's claim viewed from a standpoint of ownership of the tips, yet, in the alternative, we suggest the following treatment by way of offset.

The Fair Labor Standards Act does not prohibit in any way the exercise by any party to any suit of the legal right to offset. No mere letter from anyone to another can deprive a party litigant of this legal right even if such letter is termed a "protest". If the mechanics used in this case for any reason do not constitute

"*payment*" of wages by the employer, then the pleadings of the respective employees show that each owed to this employer the respective sums collected by each after October 22, 1938, as "tips" which as a matter of law under the facts belongs to the employer and such employer is entitled to offset same against the claim of each for unpaid wages. One exactly offsets the other. Paragraph VI of the amended complaint shows that during the period in question each Red Cap collected tips,
80 which we say as a matter of law belong to this company (if the employer-employee relationship existed) in a sum equal in each case to the amount of each claim. This balancing of accounts is inescapable on either of two viewpoints, namely, (a) if the employees agreed to the company letter of October 22, 1938, by continuing thereafter in its employment, or (b) if they did not agree to it by continuing in its employment. The funds belonged to the company in either event. In the first place it is by agreement and in the second place it is by operation of law even without an agreement.

The protest against "the method" of payment "made for the reasons set forth herein" gave the specific reason: the legal conclusion that "the law * * * does not authorize the carrier to depend upon others to discharge its obligation * * * with respect to the payment of wages * * *." This employer did not "depend upon others to discharge its obligation with respect to payment of wages". It recognized its obligation and agreed to discharge it in full by the use of the "method" described in its letter of October 22, 1938. In that letter the company exercised its ownership of its funds (the tips) by permitting the Red Caps to "retain" them rather than manually deliver them periodically to the company. It might be argued that the protest was intended to express the view of the Red Caps that the "tips" received from the

public did not belong in law to the company, but such erroneous view of the legal effect of these transactions does not change the fact in law that such tips were company income and funds. The protest is inconsistent within itself in that it asserted (1) that the Red Caps were employees of the company, but (2) that the income or consideration received for the service rendered by employees for the company did not belong to the company. The income, the consideration paid for the service, belongs to the company rendering such service in the absence of an *agreement* to the contrary. If there was a lack of agreement on the ownership of the only income derived from the service rendered by the company, as claimed by plaintiff, such cannot change the fact that the income received for the service rendered by the company belonged to it—the party rendering the service. The claim of the employees that no agreement was had on the ownership of these funds requires that such ownership be placed in law under these facts in the company; and since this company provided for the charge and disposition thereof and performed the service for which the charge was made and paid, the funds belong to the company as a matter of law even if the employees would not agree that such was the case.

81

Conclusion.

It has been suggested by plaintiff that Section 6 of the Fair Labor Standards Act, which provides for payment of wages to employees by employers, should be so literally construed as to nullify the act of The Terminal Company in making payment in the manner prescribed in its notice of October 22nd. In other words, it is argued that the "method" prescribed is at best an indirect and not a direct payment, and that the terms of the statute, strictly construed, require a direct payment. We feel certain that the spirit

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and intent of the Act is that the employee shall receive certain wages in payment for his services, and if the wages are paid for and on behalf of the employer under any method, not illegal, such is payment of wages by the employer.

Of course every legislative act which involves payment of wages, treats and refers to wages as consideration or remuneration moving from employer to employee. The existence of the relationship assumes that the consideration or pay for the services performed so moves. If the consideration for services did not come from the employer, the latter would not have the right to direct the details and manner of work, and the relationship of master and servant would not exist. All Workmen's Compensation Acts, so far as we know, speak of consideration or pay received by the employee *from the employer*. That is particularly true of our own Texas Workmen's Compensation Act; and yet, despite the language contained therein defining wages as remuneration "which the employee receives *from the employer*" (Article 8309, Vernon's Annotated Texas Statutes) our Texas Courts uniformly hold that tips received from a third person for whom the employer is rendering a service through his employee are within such definition and are *wages* received from the employer. (See *Federal Underwriters Exchange vs. Husted*, 94 S. W. (2d) 540, and authorities cited in support thereof.) Similar authorities from other jurisdictions are found on page 34 and '36 herein.

83 If any one of the propositions asserted by us under Sections I or II of this Brief be correct, the suggestion that we have not complied with Section 6 of the Act must fall. If the tips paid for services performed by us through our employees *were ours* after October 24, 1938, either by contract, the legal validity of

which was merely questioned in the "protest" of October 24th, or by contract which was accepted, despite a protest, by the action of the Red Caps in "thereafter engaging in the handling of hand baggage" or by operation of law, it was within our power to dispose of them as we saw fit. We could have our property applied against wages due or we could have directed the disposition of our property in any other manner that we wished.

In effect, plaintiff argues that under the language of Section 6 of the Act, an employer is not paying wages to an employee even though he is seeing to it that funds in an equal amount belonging to him are received by the employee. If I owe John Ten Dollars and Harry owes me Ten Dollars, and I see to it that Harry pays the full Ten Dollars to John, is it not an unsound argument to say that I have not discharged my debt to John and have not paid him the Ten Dollars I owed him? Is not this exactly the argument plaintiff is making in connection with the "employer to employee" matter, thus seeking to have *form* utterly obliterate *substance*? Surely our Courts will not lend a very attentive ear to such argument.

84 As stated hereinbefore, other grounds supporting the position of defendant are contained in its motion, but we believe the Court would prefer that we confine this Brief to the particular issue discussed.

Respectfully submitted,

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Filed 7 day of June, 1940, at 1 o'clock P. M.

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR A NEW TRIAL.

85 Filed June 15, 1940.

(Title Omitted.)

Plaintiff has already furnished the Court with a brief in this case and we will not burden the Court with a repetition of the matters contained therein, but will endeavor to confine ourselves to replying to the new matters in defendant's brief in support of its motion for a new trial. Defendant in its brief discusses two points: First, that the red caps by continuing in the employ of defendant after the service of the notice of October 22, 1938, thereby accepted the terms thereof, and that defendant by carrying out the provisions of that notice has complied with the Fair Labor Standards Act; and second, that even in the absence of an agreement between defendant and the red caps, the tips received by the red caps from passengers in payment of services rendered by the red caps belonged to the company as a matter of law. We shall answer these contentions separately.

I.

(a) The Accounting and Guarantee Notice of October 22, 1938, Never Became a Part of the Employment Contract Between Defendant and the Red Caps as the Latter Protested Against the Arrangement, and the Conduct of the Company and the Men Thereafter Shows That There Was No Meeting of the Minds Thereon and That the Question as to the Right of the Company to Offset Tips Against Wages Remained Open to This Day.

As Your Honor held in your oral opinion, not only does the record show that the red caps refused to accept the terms of defendant's notice of October 22, 1938, but the subsequent conduct of defendant shows that the
86 question as to whether defendant had the right to consider the tips received by the men from passengers as a partial payment of the wages which the Fair Labor Standards Act required defendant to pay remained open to the date of the trial. This is evidenced by Mr. Buckner's letter of December 6, 1939, where he said:

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Courts and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union, of which you are the General Chairman for this Company",

and by Rule 16 of the working agreement entered into between defendant and the red caps through their representatives as of January 1, 1940, which provides for the reinstatement of a red cap if he is improperly discharged, and further provides:

"The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act', the carrier is required to pay a wage to the Red Caps over and above any amounts that may be received by them as tips. (Note) This rule shall not be construed as requiring the carrier to reimburse Red Caps for loss of tips, either now or in the future."

The cases of Shuppan vs. Peoria Railway Terminal Company, 30 Fed. (2d) 569, and L. G. Balfour Company vs. Brown, 110 S. W. (2d) 104, on which defendant relies as authority for its contention that the red caps by remaining in the defendant's employ after the notice of October 22, 1938, accepted the terms thereof and are bound thereby, are distinguishable on the facts from the case at bar, since in neither of these cases was there any evidence tending to show that the employers admitted that the changes in the employment contracts there made were in any wise an open question. In fact, in the Balfour case the Court, after quoting plaintiff's letter, which it termed a protest, but which actually was merely a request of defendant that it allow the same bonus on plaintiff's sales as on salesmen's sales, said that after this letter was written, "In so far as the record shows *the dispute ended there*". There was no recognition by defendant that any question as to plaintiff's compensation remained open for later settlement as in the case at bar.

87 Defendant says that the red caps had only two alternatives upon being served with the notice of October 22, 1938: They could either accept the terms thereof or they could leave defendant's employ. We submit that there were several other alternatives, that is, the men could have exercised their right to strike or

could have attempted to settle their differences by negotiations or by leaving the question of defendant's right to offset tips against wages open to be determined by a decision of the Courts. Both the Fair Labor Standards Act and the Railway Labor Act are intended to promote commerce by avoiding strikes to settle labor disputes, and both parties hereto attempted to carry out such purpose by entering into negotiations for a working agreement to govern the relations between defendant and the red caps. The negotiations along this line were initiated by plaintiff herein as the red caps' representative on October 11, 1938, when he wrote defendant's General Manager advising him that he had been designated by the red caps as their representative and requesting a conference for the purpose of reaching a working agreement under the terms of the Railway Labor Act. There was considerable delay in reaching an agreement and no agreement was ever reached by the parties as to whether defendant had the right to credit tips against the minimum wages required to be paid by the Fair Labor Standards Act as is evidenced by Mr. Buckner's letter of December 6, 1939, and Rule 16 of the working agreement effective January 1, 1940.

It is evident that if defendant thought that its right to such credit was settled by the men's acceptance of the terms of its notice of October 22, 1938, Mr. Buckner would not have made the statement which we have quoted in his letter of December 6, 1939, nor would he have entered into the working agreement on behalf of defendant, wherein it is recognized in Rule 16 that the question of defendant's right to credit tips against wages was one to be decided by the Courts. If defendant considered that the question of its right to offset tips against wages was settled by its notice of October 22, 1938, would it have executed this agreement with Rule 16 a part thereof?

The conduct of defendant clearly shows that it considered this question an open one and is an implied admission that the unilateral notice of October 22,
88 1938, never ripened into binding contract because it was never accepted by the men.

(b) Even If the Terms of the Notice of October 22, 1938, Were Accepted by the Red Caps, the Carrying Out of the Terms Thereof Was Not a Compliance by Defendant With the Fair Labor Standards Act.

The case of Ex Parte Farb, 174 Pac. 320, cited by defendant on the point that an employer may lawfully require his employee to agree to turn over his tips to his employer, and the case of Zappas vs. Roumeliote, 137 N. W. 935 are, of course, not binding on this Court. We have failed to find any other cases on the question, but we cannot refrain from urging on the Court that such contracts should be held void as tending to work a fraud on the public. Certainly when a person gives a tip to an employee, he intends said tip to be the employee's property, and he greatly resents it if he learns that his tip is turned over to the employer. In fact, such contracts border closely on obtaining money by false pretenses, for certainly the employer endeavors to keep the fact that he requires the tips to be turned over to him concealed, for if he did not there are very few tips the employee would receive. We submit that such contracts should be held void as being contrary to public policy and that the dissenting opinion in the case of Ex Parte Farb, Supra, should be the law. We quote part of this dissenting opinion:

"The contract . . . is one which is in its essence unconscionable and fraudulent, and is also one which in many, if not most, instances is devoid of that very ele-

ment of freedom as to one of the parties by which it is sought to be justified. It is unconscionable because by its terms the employer, as the proprietor of the place or service in connection with which the tip is received by his employee, is not entitled to it, since he is already fully paid for whatever he furnishes by his regular charges, which cover and compensate him for the fullest measure of promptness, fidelity and courtesy toward his patrons on the part of his employees. To permit him to exact more is not only to legalize an overcharge, but is also to encourage discriminations in the price and quality of his service as between those of his patrons who do and those who do not submit to the overcharge. *It is fraudulent in respect to those patrons because it secretly aims to take from them that which they intended for another*, and because its effect is to destroy the very incentive for doing those things for which the gratuity was given. . . ." (Italics ours.)

But even if this Court does not go to the extent of holding all such contracts void, we believe it should do so where the intention of such contracts is to evade the requirements of a minimum wage law by attempting to apply such tips to the payment of wages which the law requires the employer to pay, for contracts, the purpose of which is to deprive the employee of the benefits of such laws, are uniformly held to be void. City of Glendale vs. Coquat, 52 Pac. (2d) 1178; Larson vs. Rice, 100 Wash. 642, 171 Pac. 1037. The notice of October 22, 1938, shows, and defendant, in effect, admits that its purpose was to reduce the payments of wages which the Fair Labor Standards Act required it to make and to substitute for the wage payments required to be made by it a plan whereby the employee would receive most of his compensation from tips which were given him by passengers and were intended to be gratuities to him.

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It is unecessary, however, for the Court to decide whether a contract whereby an employee is required to turn over his tips to an employer is valid because the notice of October 22, 1938, does not require the red caps to turn over their tips to the defendant, but merely says to the red caps in effect: "You are privileged to retain your tips as you have always done, but with this difference: We will credit the amount of said tips against the minimum wage which the law requires us to pay you, and if you do not receive sufficient tips to equal the minimum wage, we will make up the difference". There is nothing in the notice stating that the men must turn over their tips. On the contrary, the notice specifically states that the men are privileged to retain their tips. The only limitation, in effect, sought to be made on this privilege was that the men must consider these tips as part payment of wages, so that the defendant would only have to make up the difference between the tips and the minimum wage. Thus, in the final analysis, the accounting and guarantee arrangement devised by the railroads to evade their liability under the Fair Labor Standards Act is an attempt by them to write into the Act a provision that tips received from passengers are to be considered as wages paid by the railroads. Defendant, of course, will say that this is not its effect, contending that the arrangement provides for the turning
90 over of tips by the men to the extent of the amount of the minimum wage. The notice does not, however, as we have pointed out, so provide. Stated briefly, the notice is to the effect that "The carrier . . . guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided (that is, as tips), will not be less than the minimum wage provided by law", and that the men are "privileged to retain, subject to their being credited on such guarantee,

all such tips or remuneration . . . except such portion thereof as may be required . . . for taxes". There is not a single word in the notice about the men turning over their tips. The notice merely states that the carrier guarantees that the amount of tips reported, plus the sum paid by defendant will not be less than the minimum wage. In other words, defendant was merely expressing its opinion and belief that tips were wages which could be considered as received in partial discharge of the minimum wage required to be paid by the Fair Labor Standards Act.

Furthermore, the conduct of defendant clearly shows that it construed the notice of October 22, 1938, as providing for the consideration of tips received from passengers as part payment of wages, for when it appeared, after the accounting and guarantee plan had been carried out by defendant for some four months, that the tips received by all the men came within a few dollars of the minimum wages due, the defendant abandoned the reporting of tips and simply told the men that it would assume, unless reported to the contrary, that the tips received by the men equalled the minimum wage and that if any red cap should receive in tips less than the minimum wage, he should report it to the defendant and the defendant would pay him the difference. (Agreed Statement of Facts, Paragraph IX.) Pursuant to these instructions of defendant, the men did not report their tips for the period from March 1, 1939, to October 15, 1939. We do not see how defendant can contend that during this period, when tips were not even reported, the men turned over their tips to defendant even constructively, as obviously they retained them as payment of their wages and defendant merely agreed to
91 make up any difference between the tips and the wages, if there was any, and such fact was

reported to it. It is apparent that defendant during this period was proceeding on the theory that the tips received by the men from passengers could be considered as wages paid by the defendant, and it is likewise apparent that even during the two periods when tips were reported, they were merely considered a partial payment of wages, and that defendant did not consider that the men were turning over their tips to defendant by reason of any contract so to do, as it now contends. It is a distortion of its terms to attempt to construe the notice of October 22, 1938, as requiring a turning over, even constructively, of the tips by the men and the paying back of the money received in tips by the defendant to the men as wages. The notice is nothing more nor less than an attempt on the part of the defendant to make tips wages, which, as Your Honor has said, Congress did not do. As Your Honor also held, it is inconceivable that Congress, entirely familiar with the system of tipping in America, should include in the definition of wages in Subdivision M of Section 204 of the Act the reasonable cost of furnishing the employee board, lodging or other facilities and fail to include tips, if it intended to permit the employer to avoid the payment of the minimum wage by paying him only the difference between his tips and the minimum wage.

II.

It Is Not the Law That in the Absence of an Agreement Between the Employer and the Employee, Tips Received by the Employee in the Course of His Employment Are the Property of the Employer, But on the Contrary, Such Tips Are the Property of the Employee.

Not only is defendant's contention that in the absence of an agreement between an employer and an employee,

tips received by the employee in the course of his employment in cases where the employer makes no specific charge for the service rendered by the employee, are the property of the employer, without authority to support it, but it is contrary to such authorities as there are on the subject and entirely opposed to the prevail-
92 ing practice in the past and the conduct of the parties for many years. Defendant attempts to make much of the statement in the case of Zappas vs. Roumeliote, Supra., where the Court said: "We think the Court was right in instructing that the plaintiff would be entitled to any gifts in the way of tips over and above the regular charge for the service performed given to him by patrons of the defendant's place", the allegation of plaintiff's petition in the case of Polites vs. Barlin, 149 S. W. 829, to the effect that the tips received by plaintiff were personal gifts to the employee in addition to the price charged by the employer for the work done, the statement in the dissenting opinion in the Farb case to the effect that the employer is not entitled to the tip received by the employee since he is already fully paid for whatever he furnishes by his regular charges, and the statement in the case of Sloat vs. Rochester Taxicab Company, 177 Appeals Division 57, 163 N. Y. Sup. 904, referring to the tips as being given by passengers in addition to the fare. Defendant argues that since these cases involved a situation where the tip was in addition to a charge made by an employer for the service of his employee, they in effect held that where there is no charge made by the employer for the service rendered by the employee, the tip is not the property of the employee, but is the property of the employer. It is true that defendant makes no specific charge for the service rendered by the red caps, but if this service imposes any cost on the defendant, it will undoubtedly be paid therefor by charges made against the railroads using its

terminal and owning its stock who of necessity must pay the operating expenses of defendant's terminal. Hence, it is not correct to say that defendant receives no pay for the service of the red caps simply because it does not make any specific charge therefor.

It just so happened, as is usually the case, that in the cases relied on by defendant the employers there did make a charge for the service furnished, so that the tip received by the employee was in addition to a
93 charge made by the employer. The mere fact that the Courts in the course of their opinions in these cases referred to this fact does not mean that tips are the property of the employee where a charge is also made by the employer for the service furnished, but are the property of the employer where the employer makes no charge. We have heretofore referred to the fact, of which we believe the Court will take judicial notice, that the tip giver intends the tip to be for the employe and not for the master, even in those cases where the employee receives a wage, and *a fortiori* in those cases where the employee receives no wages at all. Why should the defendant here be entitled to the tips contrary to the intention of the donor? Can A claim a gift which I give to B? Furthermore, why should the defendant be entitled to such tips when it pays no wage to the employee- What has it done to earn the tip? Defendant on Page 72 of its brief says that it was obligated to pay and intended to pay the red caps for the services rendered by them, and therefore, it was entitled to their tips since it got no other revenue from their services. This statement is rather surprising in view of defendant's position throughout the trial that the red caps were not its employees, that they were not engaged in interstate commerce, and that it was not obligated to pay them anything under the Fair Labor Standards Act.

Defendant says, and we do not dispute it, that it had the legal right to determine whether it would make a charge for the service of the red cap after October 22, 1938. Some of the railroads have done so by requiring the red caps to charge and collect from the passengers the sum of 10¢ for each bag carried. This is the plan which has been adopted by the Terminal Railroad Association of St. Louis and by the terminal companies at Cincinnati and Kansas City. This money, of course, belongs to the company and must be turned over by the red caps to the company. The company then pays the red cap his minimum wage in full regardless of how much he has collected from passengers at 10¢ for each bag carried. It is, however, stretching things too much
94 for defendant to say that the tips voluntarily paid by passengers are charges made by the defendant for the service of the red caps. In the first place, tips have always been considered to be gratuities which are given as a reward for good service which the donor is under no obligation to give, while a charge is compulsory and if not paid can be enforced by legal process. Furthermore, if defendant wants to make a charge for the service of the red caps, since the Court has held that these men are engaged in interstate commerce, the service rendered is a transportation service, and defendant can make no charge therefor until it has first filed with the Interstate Commerce Commission proper tariffs showing the charges which it will make, and these charges must be uniform, so that all passengers will pay the same charge for the same service. Thus, the Interstate Commerce Act requires (U. S. Code, Title 49, Section 2) that it is unlawful for any common carrier directly or indirectly by any special rate *or other device*, to charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or

property than it charges, demands, collects or receives from any other person or persons for doing for him or them a similar service. Section 6 (7) of the Act also prohibits any carrier from engaging or participating in the transportation of passengers or property in interstate commerce unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published as required by the Act, and also prohibits the carrier from charging one person more than another for like service. It is obvious that there is no uniformity in tips for similar services, as the size of the tip depends upon the generosity of the one giving it. If these tips are to be considered as charges made, collected or received by the defendant, then the defendant is guilty of two violations of the Interstate Commerce Act since it is discriminating by receiving more from one passenger than from another for the same service, and since it has no right at all to charge for this transportation service in the absence of a tariff filed with the
95 Commission. The record shows that the red caps were instructed by defendant's station master to furnish such service as the passengers requested, even though they gave no tips therefor, and if the tips received may be said to be charges made by the defendant for the services of the red caps, then the defendant is guilty of another violation of the Interstate Commerce Act, since it is discriminating by furnishing free service to one passenger while it receives charges for like services from another.

Defendant relies on an obiter dictum statement in the case of Sloat, et al, vs. Rochester Taxicab Company, et al, (Sup. Ct., Appellate Division, 3rd Department), 163 N. Y. Sup. 904, to the effect that it probably would have been the duty of the employee to turn over his tips to the employer in the absence of an understanding to the

contrary. This statement is pure dictum because the facts there were that it was the custom and understanding between the employer and the employee that the gratuities or tips received by the employee were to be retained by him for his personal use. Consequently, the Court did not have before it for decision the question as to whom the tips belonged in the absence of a custom or understanding that they belonged to the employee. Furthermore, the Court said that in the absence of an understanding it *probably* would have been the duty of the employee to turn his tips over to the employer, indicating that the Court did not seriously consider the question and was just expressing its offhand opinion. The point in this case actually decided by the Court was that tips were to be included in arriving at the average weekly earnings of the employee under the New York Workmen's Compensation Act. The Court's decision turned on the point that the word "wages" and the word "earnings" were used synonymously in the New York Law, saying: "We must give further attention to Section 14. In three of its five subdivisions it speaks of the average annual earnings of the employee, indicating that the Legislature saw no broad distinction between the word 'earnings' and the word 'wages'; and under the facts of this case no distinction between them is apparent". The Court also said: "The Court should treat these tips in the same manner in which the employer and employee treat them, as a part of the compensation to be received by the employee for the service rendered by the employer, a part of the wages, a part of the average annual earnings of the employee". The definition of "wages" in the New York Act is similar to that in the Texas Act, the word "wages" being defined as follows: "The money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reason-

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able value of board, rent, housing, lodging or similar advantage received from the employer". The Court held that the tips received by the employee were an advantage received from the employer.

In the case of Bryant vs. Pullman Company, cited by the defendant and decided by the same Court, 177 N. Y. Sup. 488, the Court followed the Sloat case and held that the tips received by the Pullman porter were to be considered as part of his wages. This decision was likewise based on the fact that the words "wages" and "earnings" were deemed synonymous in the Act and the tips were considered to be an advantage received by the employee from the employer.

In Gross' case, also relied on by defendant, 166 Atl. 55, the Court also based its decision upon the fact that the Maine Compensation Act used the word "earnings" as well as "wages", saying (166 Atl. 1. c. 56): "The Maine Compensation Act uses the term 'wages, earning or salary'. The word 'earnings' occurs in the English Act. . . . This word has been interpreted before the passage of our Act to include tips. Penn vs. Spiers and Pond, Ltd., 1 K. B. 766". The Court held that tips were earnings and adopted the reasoning of the Court in the Sloat case that they were an advantage received from the employer.

The decision in the case of Federal Underwriters Exchange vs. Husted, 94 S. W. (2d) 540 that tips received by an employee were to be considered in figuring the basis of the employee's compensation under the Texas Workmen's Compensation Act was likewise based on the fact that the Texas Act includes in the definition of wages "other advantage which can be estimated in money", which the Court felt was broad enough to include tips.

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It will thus be seen that the four Workmen's Compensation cases cited by defendant holding that tips are to be considered in figuring the benefits due the employee under Workmen's Compensation laws are all distinguishable from the case at bar because the Fair Labor Standards Act does not use the broad term "earnings", but rather, the restricted term "wages", and further because Section 3 (m) of the Act, defining the word "wage", does not contain any broad language such as "other advantage" received by the employee from the employer as do the compensation acts.

On Page 79 of its brief defendant says that plaintiff has failed to prove ownership of the tips in the employees because he did not prove that there was paid over to defendant any sum whatever to compensate it for the services rendered to passengers, and failed to prove that tips received by the employees were in addition to any regular charge made by defendant for such services. Defendant further says that the plaintiff failed to prove that the tips were intended as a gratuity to the red caps and were not intended as payment for services rendered by the company. Plaintiff submits that it was not necessary for him to prove that the defendant made any charge for its services, for as we have shown, there is nothing in the cases on which defendant relies which requires that a tip given to an employee be in addition to a regular charge made by the employer for the service in order that the tip may be the property of the employee. We submit that all these cases meant when they said that the employee was entitled to any gifts in the way of tips over and above the regular charge for the service performed was that the regular charge belonged to the employer and that anything in excess thereof was intended to be a gift to the employee and would be considered as such. These cases are not authority for the proposition

that tips are the property of the employer where the employer makes no specific charge for the service. The record is sufficient to show that the tips received by the red caps from passengers were intended as gratuities to the red caps and were not intended as payment for any service rendered by the defendant. The record shows that for more than thirteen years the men had been receiving tips and had been retaining them. It is also a matter of common knowledge, of which the Court should take judicial notice, that tips given an employee are intended as gratuities to the employee and not as payment to the employer for any services the tipper may receive.

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Defendant in its brief (Page 81) says that the company prescribed a charge for its service in its letter of October 22, 1938. There is nothing whatsoever in the letter which says anything about charging passengers for the service rendered by the red caps, and as a matter of fact, the red caps were instructed by defendant's station master to render whatever service a passenger requested even though the passenger did not tip the red cap therefor.

The Supreme Court of Iowa in the case of Zappas vs. Roumeliote, 137 N. W. 935, said that the burden of proof is on the employer to show an agreement on the part of the employee to turn over his tips to the employer. This burden defendant in this case has wholly failed to sustain, and for that reason the tips must under the cases be considered to be the property of the red caps.

Plaintiff respectfully submits that the decision and judgment of this Court heretofore entered were correct

and that defendant's motion for a new trial should accordingly be overruled.

CHARLES M. HAY,
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E. D. FRANEY,
W. I. SAVAGE,
Attorneys for Plaintiff.

506 Olive Street,
St. Louis, Missouri.

Copy mailed to Messrs. Robertson, Leachman, Payne, Gardere and Lancaster, Dallas, Texas.

APPLICATION FOR LEAVE TO AMEND AND FILE COUNTERCLAIM.

99 Filed June 7, 1940.

(Title Omitted.)

To the Honorable Court:

Now comes the defendant, The Union Terminal Company, and applies to the Court for leave to file an amended answer and counterclaim, and for trial of the issues raised thereby, and shows the Court:

I.

That in its original answer defendant alleged facts showing a contract between it and the Red Caps and that it believed and still believes that such a contract existed and was effective. Further that even though it be held that no contract was in effect between defendant

and the Red Caps, nevertheless plaintiff's petition shows on its face that such Red Caps have collected during the period in question $38,626.99 which sum was paid by patrons of this defendant in payment for services rendered to such patrons by this defendant, and which sum in law belongs to this defendant; and that such sum exactly offsets, the amount of wages claimed by the Red Caps; that with the application of such offset, no wages will be due plaintiff. That while defendant believes that its right to such offset appears on the face of plaintiff's pleadings as well as in proof, yet out of an abundance of precaution, defendant asks leave to amend its answer so that it may formally plead such offset and in the event it should be held that such a pleading is necessary, defendant's right thereto will be preserved.

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II.

The failure to file this counterclaim at an earlier time was not due to inexcusable neglect and justice will be served if defendant be allowed to amend setting up the counterclaim as is set out in the copy of said amendment and counterclaim attached hereto as Exhibit "A".

III.

That no hardship will be worked by allowing the filing of said counterclaim and a trial thereon; that such counterclaim may be decided without the necessity of any additional proof thereon, upon the record already before the Court.

Wherefore, defendant prays that it be allowed to file its amended answer and counterclaim presented herewith

and that the final judgment herein include a disposition of such counterclaim.

GUS M. HODGES,
ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

This motion served by mailing a copy to plaintiff's counsel together with copy of proposed amended answer and counterclaim.

June 7, 1940.

101 EXHIBIT "A".

Defendant's Amended Answer and Counterclaim.

(Title Omitted.)

I.

Defendant denies the allegations of Paragraph I of Plaintiff's Amended Complaint, and shows that the alleged action is not one coming within "The Fair Labor Standards Act of 1938" or of any other law of the United States regulating Interstate Commerce.

II.

As to Paragraph II of plaintiff's Amended Complaint, defendant admits that A. J. Pickett is the General Chair-

man of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; defendant denies that the "Fair Labor Standards Act of 1938" is applicable to the cause; defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations of Paragraph II.

III.

As to Paragraph III of Plaintiff's Amended Complaint, defendant admits that it "is a corporation organized, existing and doing business under the laws of the
102 State of Texas, and since October 24, 1938, has continuously maintained and operated a railroad terminal and terminal facilities in the City of Dallas, Texas"; defendant admits that it employed the persons named, and says said named persons did work for it as such employees in and around defendant's premises during the times mentioned as red caps, handling the baggage and traveling effects of persons entering and leaving its premises. Defendant denies all of the allegations of said paragraph except as expressly alleged or explained above.

IV.

Defendant denies the allegations of Paragraph IV of Plaintiff's Amended Complaint.

V.

Defendant denies all of the allegations of Paragraph V of Plaintiff's amended complaint, except as hereinafter specifically set out:

(a) Prior to October 24, 1938, the defendant delivered a notice, a copy of which is hereto attached and marked

Exhibit "A", to each of the Red Caps set out in Plaintiff's amended station, notifying them that defendant guaranteed to each of them continuing work as Red Caps after October 24, 1938, that they would receive as compensation not less than the minimum provided by the Fair Labor Standards Act; that said Red Caps should report to defendant the amount of tips and renumerations collected by them each day, and that instead of turning such tips and renumerations in to defendant, said Red Caps should retain all such tips and renumerations subject to being credited upon the guaranteed compensation and subject also to the requirement that each Red Cap pay to defendant the amount of taxes imposed by law upon Red Caps and required by law to be collected by defendant.

103 (b) Thereafter pursuant to such notice the Red Caps and each of them reported each day to defendant the number of hours worked and the amount of tips and renumeration collected; and such Red Caps were allowed to and did retain for their own use and benefit all such tips and renumerations collected by them while working about defendant's premises instead of turning them in to defendant; in addition, for each work period between October 24, 1938, and October 24, 1939, during which the tips and renumerations collected and retained by each Red Cap did not equal the number of hours worked multiplied by twenty-five cents (25 cents), the defendant paid to each of such Red Caps an amount equal to the difference; and for each work period after October 24, 1939, during which the tips and renumerations collected and retained did not equal the number of hours worked multiplied by thirty cents (30 cents) defendant paid to each Red Cap the difference; so that defendant has fully complied with its guarantee and has paid to and each Red Cap has received not less than the

minimum provided by the Fair Labor Standards Act, notwithstanding such Act is inapplicable to them.

(c) With regard to the table of figures set out in Paragraph V of Plaintiff's Amended Complaint, defendant shows that it has not yet completed a full check of such figures, but that subject to possible minor differences revealed by such check and subject to its denial that the titles used as headings for the columns are appropriate or applicable, defendant admits that the named persons worked as Red Caps the number of hours set forth; that the amounts under the heading "Total Wages Earned" are the correct result of multiplying the hours worked by twenty-five cents (25 cents) and thirty cents (30 cents) as shown; that the amounts shown in the next column were actually paid to the persons named by the defendant; and that the amounts in the last right hand column are the correct remainders when the amounts in next to last column are deducted from the
104 amounts in the preceding column. Any part of the next to last column attributable to taxes paid, constitutes taxes imposed upon the individual Red Cap and required by law to be collected by the defendant.

VI.

As to Paragraph VI of Plaintiff's Amended Complaint, defendant shows that each of said Red Caps named received in excess of the amount shown opposite, in tips and renumerations, otherwise defendant denies the allegations of said paragraph.

VII.

Defendant denies all of the allegations of Paragraph VII of Plaintiff's Amended Complaint and all of the prayer of said complaint.

Defendant's Counterclaim.

VIII.

Defendant shows that in the event it be held that there was no contract by virtue of the notice given by defendant to the Red Caps as set out above in Paragraph V hereof and the action of said Red Gaps in continuing to work after October 24, 1938, receiving, reporting and retaining tips collected and accepting payments from the defendant, and it should be further held that the disposition by defendant of the tips collected did not constitute the payment of a wage to the said Red Caps:

(a) That each of the particular Red Caps involved herein owes to defendant the particular amount set opposite his name below, as each of them received said amount belonging to defendant, as payment to defendant for services rendered by it to the various parties making such payments, and each of said Red Caps has and retains said amounts set opposite his name and is withholding same from the defendant to defendant's damage in the total amount of Forty Thousand Dollars and No Cents ($40,000.00).

105 (b) The amount owed defendant by each of said Red Caps as money had and received by each from October 24, 1938, through March 6, 1940, and belonging to defendant, is as follows:

Foster, James	$ 962.70
Johnson, Isaac	962.19
Franks, J. C.	1,010.02
Brigham, J. W.	1,010.17
Brooks, Lemuel	970.37
Johnson, A. R.	974.17

Jefferson, John	998.23
Alexander, O. A.	976.95
Jackson, Joe	986.33
McIntosh, Nathan	952.09
Turner, Nelson	974.48
Thomas, Allen	958.92
Williams, Richard	1,018.20
Hollingsworth, Ulyssus	917.97
Turpin, J. T.	832.50
Campbell, Dave	863.42
Fields, Nelson	910.71
Robertson, C. H.	738.13
Hunt, Haywood	981.57
Spears, Donale	994.94
Hynson, Clinton,	970.68
Curry, J. P.	984.52
Langston, Charles	909.72
Muckelroy, Charles	910.12
Jackson, Felix	991.37
Brigham, Paul	960.97
May, Arthur	961.00
Jones, Theodore	677.70
Cameron, Tilson W.	773.90
McMurray, William	151.94
Amos, Earnest	797.94
Barton, Harry	955.88
Wells, Adolphus	809.44
Connor, Alphonso	935.77
McNiel, Lawrence	892.50
Busby, Cornelius	518.02
Jackson, Columbus	988.39
Mathews, Everett	926.73
Southern, Frank	955.96
Campbell, Scott	9.00
Barton, H. N.	965.55
Kelton, Silas	196.35

Bailey, Frank	438.80
Ellston, Russell	1,008.39
Total	$38,626.99

Wherefore, defendant prays that plaintiff take nothing and that defendant have judgment adjudicating that none of the persons named in plaintiff's second amended complaint have any claim against defendant, and for all costs; and in the alternative defendant prays that if any judgment is had against it, that it have judgment against each of said Red Caps in the respective amounts set out opposite the name of each and that same offset the claim of each herein for wages and for costs.

ROBERT G. PAYNE,
106 GUS. M. HODGES,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE & LANCASTER,
Attorneys for Defendant.

Amended answer served on plaintiff by mailing a copy to plaintiff's attorneys.

June 7th, 1940.

ORDER OVERRULING DEFENDANT'S APPLICATION FOR LEAVE TO AMEND.

107 Filed June 17, 1940.

On this the 17th day of June, 1940, came on to be heard the Defendant's Application for Leave to File

Amended Answer and Counterclaim herein, and the Court having heard said Application and being fully advised in the premises, it is Ordered that said motion be and it is hereby overruled.

To the foregoing order overruling Defendant's Application for Leave to File Amended Answer and Counterclaim, the defendant in open Court objected and excepted.

WM. H. ATWELL,
Judge of the United States District Court for the Northern District of Texas, Dallas Division.

DEFENDANT'S AMENDED MOTION FOR NEW TRIAL.

108 Filed June 17, 1940.

(Title Omitted.)

To the Honorable Court:

Now comes The Union Terminal Company and with leave of Court and files its amended motion for new trial moving the Court to set aside the judgment rendered herein and grant a new trial, on the following grounds:

I.

The Court erred in holding that this defendant employer's notice of October 22, 1938, given to each of its Red Cap employees setting out the terms and conditions of their future employment did not bind the latter in law by their conduct in continuing in service, collecting, reporting and retaining tips, and accepting payment of

the difference between the income received from tips and the minimum wage requirements from the defendant, because such clearly was a notice specifying conditions of future employment which in law was binding upon those employees thereafter continuing in service and accepting wages paid and based thereon, and said Red Caps rejected their only alternative of exercising their right to quit work if dissatisfied with the terms of future employment prescribed by the employer in said notice.

109 II.

The Court erred in holding that the letter of protest written to defendant employer on October 24, 1938, by A. J. Picket had the effect of depriving defendant of its right, exercised in its October 22nd notice, of prescribing the terms of future employment for its employees; because the Red Caps, by continuing in the service, accepted the conditions of such notice and such conduct had the legal effect of contradicting anything said or implied in said protest letter; and further because, in any event, said protest letter does not purport to be or does not amount to a refusal to be bound by the terms imposed upon them in their future employment, but is merely a statement of a legal opinion that the legal effect of the method prescribed is not in compliance with the Fair Labor Standards Law.

III.

The Court erred in failing to hold that, regardless of whether or not there was an agreement to the terms of the October 22nd notice, the defendant complied with the Fair Labor Standards Law; because if, as held by the Court, the Red Caps are defendant's employees it must

follow that the service rendered the patrons is furnished by the employer defendant; that, unlike gratuities given over and above the price of the service, the tips were given in payment of the service rendered by defendant through the Red Caps, hence such payments for such service belonged in law to defendant, the one furnishing the service, and it had the right and power to control and dispose of such income belonging to it, which right and power it exercised by applying same on wages. It was unnecessary for it to follow the formality or mechanics of having such payments manually delivered to defendant and then manually delivering it back to the Red Caps as wages, as the method prescribed and followed had that legal effect.

110 IV.

The Court erred in rendering judgment for the plaintiff herein for wages in the sum of $38,626.99 because the plaintiff wholly failed to discharge the burden placed on him by law of alleging and proving that the $38,626.99, admittedly received by the Red Caps during the period, was paid to the Red Caps as a gratuity and was an amount over and above the amount paid by such patrons to and received by the company as compensation for the service rendered by the company to the patron through the Red Cap.

V.

The Court erred in holding that each of the Red Caps for whom this action is brought, was "engaged in commerce"; because the service performed by said Red Caps is purely local, forming no part of any interstate commerce and on the contrary is independently arranged for, directed and compensated for, not included in the

price of ticket or arranged with and as a part of the interstate journey.

VI.

That under the pleadings and evidence, even though it be found that there was no contract making the retention of tips a payment of wages and that in the absence of such contract the tips collected and retained by the Red Caps were not wages paid them, still it appears as a matter of law that said Red Caps, while acting in the course of their employment for defendant collected payments made by the defendant's patrons in the form of tips for services rendered to the patrons by the defendant through the Red Caps, which payments as a matter of law belong to defendant and which exactly offset any claim for wages by plaintiff, so that a new trial should therefore be granted. In the alternative, if the
111 Court holds that such offset should be formally set up by way of counterclaim, defendant asks the Court to grant a new trial herein and allow a trial on the issues raised by defendant's counterclaim in accordance with defendant's application for leave to file and be heard on such counterclaim.

VIII.

Without waiving its position that no recovery should have been allowed but still insisting on same, defendant submits that in any event the Court erred in rendering judgment for "liquidated damages" in the amount of $38,626.99 over and above what was found by the Court to be unpaid minimum wages, because the evidence shows that defendant in good faith pursued a plan which it reasonably believed to be in compliance with the Fair Labor Standards Act, and in the defense of this action

was in good faith litigating and seeking a judicial determination of a bona fide existing controversy as to whether or not there was due from it any "unpaid minimum wages" under the Fair Labor Standards Act, and should not in such circumstances be subject to the harsh penalties of the so-called "liquidated damages".

Wherefore, Defendant prays, that the judgment herein be set aside and a new trial granted; and in the alternative defendant prays that it be allowed to file a counterclaim herein and have a trial on such counterclaim so that it may be disposed of in the final judgment herein.

ROBERT G. PAYNE,
GUS M. HODGES,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

This motion served on plaintiffs by mailing a copy of same to plaintiff's counsel.

June 17, 1940.

ORDER OVERRULING DEFENDANT'S AMENDED MOTION FOR A NEW TRIAL.

112 Filed June 17, 1940.

On this the 17th day of June, 1940, there came on to be heard the Defendant's Amended Motion for a New Trial, and the Court having heard the same and the

argument of counsel thereon, it is Ordered by the Court that said Motion be and it is hereby overruled.

To the foregoing order overruling Defendant's Amended Motion for a New Trial, the defendant in open Court objected and excepted.

WM. H. ATWELL,
Judge of the United States District Court for the Northern District of Texas, Dallas Division.

AGREED STATEMENT OF FACTS.

113 Filed July 22, 1940.

115 In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

vs. No. 248-Civil.

The Union Terminal Company, a Corporation.

Appearances:

Hay & Flanagan, St. Louis, Missouri, and W. T. Savage, Dallas, Texas,
Representing the Plaintiffs.

Robertson, Leachman, Payne, Gardere & Lancaster, Dallas, Texas,
Representing the Defendant.

Transcript of proceedings had before Judge William H. Atwell, at Dallas, Texas, in the above matter on May 27, 1940.

The Court:

Call the matter set.

(Which was done by the Clerk, and announcement of ready was made by both sides.)

116 The Court:

Let me have a little statement of the case, gentlemen, if you please. I know generally what it is, but I would like to have a statement.

Mr. Flanagan:

The plaintiff in this case, if Your Honor please, is general chairman of the Brotherhood of Railway Clerks, and has been duly authorized by the Red Caps, who are employed at the Union Terminal Station of the Defendant here in the City of Dallas, for the purpose of bringing this suit under the Fair Labor Standards Act. The suit is one for wages for the minimum scale of wages set forth in the act, based upon 25 cents an hour for the first year that the Act is in effect, and 30 cents an hour thereafter. The Plaintiff in this case claims that all of these men were employed by the Defendant as Red Caps from the Month of October, I think the 22nd of October, 1938, up until the present time. The wages from the 22nd day of October, 1938, up until the 6th day of March, 1940, is claimed. The evidence will show that prior to the enactment of the Fair Labor Standards Act these men were carrying baggage to and from trains operating in and out of this station. The evidence will show that the only compensation that they received prior to the enactment of the Fair Labor Standards Act was the tips or gratuitous that they received from passengers traveling back and forth through the station. The evidence will show that on October 22, 1938, the date the Act went into effect, the defendant served notice upon these
117 men that they would have to report the tips that they received, and that they would make up

the difference between the amount of the tips and the amount that they would have earned or did earn at the rate of 25 cents per hour. The evidence will show that two days later Mr. Pickett, acting in behalf of these men, and at their request, notified the defendant that they protested that arrangement and that it was not acceptable to them. The evidence will show that the defendant did not discharge any of these men after the protest was filed, but continued them in the service, and thereafter paid them small amounts of money ranging from perhaps $1.00 to three or four dollars each pay day, which represented the difference between the amount that they collected in tips and what they would have earned at the rate of 25 cents or thirty cents an hour. The evidence will show that there were negotiations under the Railway Labor Act for an agreement between the company and these men, and that those negotiations continued up until the first day of January of 1940 at which time there was a working agreement entered into in writing between the parties. The evidence will show that during all of this time that the men had protested against the action of the company in failing to pay them the minimum wage provided for under the Fair Labor Standards Act. The evidence will show that on the first day of January, 1940, when this written agreement was entered into that in Section 16 of that agreement, a copy of which will be submitted to Your Honor, that the matter was still in dispute and left open, such an ar-
118 rangement that if any man was wrongfully discharged and it was determined that the Fair Labor Standards Act applied to these men, then they would be reimbursed, whatever out-of-pocket, except they would not be paid any lost tips. The evidence will show, I think, on December 6, 1939, Mr. Murrell Buckner, who was Vice-President and General Manager of the defendant company, wrote Mr. Pickett a letter advising him that

they would enter into an agreement with these men under the Railroad Labor Act, whenever the dispute in question was settled by the Courts.

Of course, as far as we have been able to ascertain this is the first case in the United States that has proceeded to trial. So that, the evidence will also show that the trains operating in and out of this station were engaged in interstate commerce, that the men under the instruction of the Station Master were required to unload baggage—I should not say baggage, but I should say unload the personal effects or traveling bags of passengers from these trains, from the platform to the ground at the station, and in many instances they were required to carry these bags for people who paid them nothing in the form of tips; that they were instructed that if the people asked them to do it they would have to do it whether they were paid or not.

The evidence, I think, will show that in many instances there were old people, sick people or cripple people going to and from these trains, traveling from various parts of the United States, and that these men carried the
119 baggage for, and had instructions to carry it for them, and that they received nothing for it.

The evidence will show that the relationship of the employer and employee existed between the plaintiffs and the defendant. The evidence will show that these men were required to do many things which involved the relationship of master and servant, and which indicated that they were working in interstate commerce. We will also have for introduction the findings of the Interstate Commerce Commission with reference to this class of employees which is referred to as ex parte 72, and I think that finding was on December 20, 1937. These cer-

tified copies of the record of the Commission and its findings will show that the defendant company was a party to that proceeding.

The evidence will show the amount of money that these men would have earned at the rate of 25 or 30 cents an hour, the amount that would pay to them at various times by the defendant in the form of wages and taxes, and the balance which we claim is due them.

Now the parties in this case, if Your Honor please, have worked out an agreed statement of facts which we feel will shorten the trial of the case, and the original of which we would like to file with the Court for your reference as you may see fit to inspect it.

We have agreed that the number of letters and documents are the originals or exact copies of originals, and that they may be used in evidence without the
120 necessity of proving them. We ask leave to file with Your Honor this agreed statement of facts.

The Court:

Don't file it with me, but call my attention to parts of it.

Mr. Payne:

Most of the matters that Mr. Flanagan referred to are covered by that stipulation, some of these I do not consider material. I would like to say with reference to defendant's position, that in June, 1938, this Fair Labor Standards Act was passed to provide what Mr. Flanagan says is a minimum wage of 25 cents per hour. It was to go into effect on October 24, 1938. On October 22nd Mr. Buckner, acting for the Union Terminal Company,

served on each individual Red Cap a notice calling his attention to the Fair Labor Standards Act, and calling to his attention the fact that certain wages were due, and guaranteeing to each individual Red Cap that so long as he performed the service, such as carrying baggage for the Union Terminal Company, that he would receive that wage that Congress had provided for, subject, however, to this provision, that the Red Cap could retain but would have to report to the Terminal Company any tips that were paid the Red Cap, and such tips were to be credited on the guarantee of the Union Terminal Company covering the wage and that the company would pay the difference.

Mr. Flanagan says Mr. Pickett, representing that he was acting for the Red Caps, wrote a letter on October 24th saying that he was not agreeable to the
121 terms of the proposal that we submitted on October 22nd, but nevertheless the Red Caps continued to work, they continued to collect their tips and reported their tips and received the cash or checks for the difference between the tips and 25 cents or 30 cents per hour as the case may be, and we say that they have been paid in full sixty and seventy dollars per month right along from October 23, 1938, until to date.

The Court:

All right, proceed with the testimony. Read your agreement or call your first witness.

Mr. Flanagan:

I wish to offer in evidence, if Your Honor please, the first paragraph of the Agreed Statement of Facts as follows:

"It Is Agreed that the figures shown in Paragraph Five of plaintiff's Second Amended Complaint as to the number of hours worked by each Red Cap are true and correct; that the column in Paragraph Five, headed 'Total Wages Earned', correctly reflects such hours worked multiplied by Twenty-five Cents ($0.25) as to hours worked prior to October 24, 1939, and by Thirty Cents ($0.30) as to hours worked after that date; that the column in Paragraph Five, headed 'Total Wages and Taxes Paid by Defendant', correctly represents the amounts received by said Red Caps of defendant over and above tips; that the column headed 'Balance Due' correctly represents the difference between the amounts set forth under the column headed 'Total Wages Earned' and the amounts set forth under column headed 'Total Wages and Taxes paid by Defendant'; that said Red Caps collected tips
122 from persons using defendant's station equal to or greater than the amounts set out under the column headed 'Balance Due'. It is understood that the defendant does not agree that the titles used as column headings in Paragraph Five of plaintiff's Second Amended Complaint are properly applicable or are correctly stated."

Mr. Flanagan:

We next offer in evidence the Second Paragraph of the Agreed Statement of Facts as follows:

"It Is Agreed that during the period mentioned in plaintiff's second amended complaint the red caps referred to therein were engaged in carrying baggage of persons into and out of said station from point to point within the station, and to and from trains entering and leaving defendant's station or of persons going from one train to another at defendant's depot; that some of said red caps occasionally engaged in wheeling sick and infirm

passengers to and from trains in wheel chairs; that only such passengers as so desired availed themselves of such services; that some of the trains entering and leaving defendant's station moved in interstate commerce and some in intrastate commerce."

Mr. Flanagan:

We next offer in evidence the Third Paragraph of the Agreed Statement of Facts as follows:

"It Is Agreed that the defendant is and was during the period referred to in plaintiff's second amended complaint a corporation organized under the laws of the State of Texas for the purpose of engaging in and carrying on a terminal passenger, baggage and mail service for the railroads owning its stock; and it
123 does and did during said period carry on such a business. The stock of defendant is owned by the following railroads: The Texas and Pacific Railway Company; Missouri-Kansas-Texas Railroad Company of Texas, Gulf, Colorado and Santa Fe Railway Company, The Chicago, Rock Island and Gulf Railway Company, St. Louis-Southwestern Railway Company of Texas, Texas and New Orleans Railroad Company, St. Louis, San Francisco and Texas Railway Company, and Fort Worth and Denver City Railway Company; that the defendant owns a depot, buildings, tracks, engines and other properties necessary to its business. The above named railroads operate trains in, out and through defendant's yards and station, some of said trains moving in interstate commerce and some in intrastate commerce. Defendant did during the period involved herein sell railway tickets for and on behlaf of the above named roads; some of the tickets are for trips to points within the State and some of the tickets are for trips to points out of the State, a substantial volume of both classes of tickets being sold."

Mr. Flanagan:

We next offer in evidence the Fourth Paragraph of the Agreed Statement of Facts, as follows:

"It Is Agreed that plaintiff, A. J. Pickett, is the authorized agent and representative of the red caps named in the plaintiff's second amended complaint, and is their duly authorized agent and attorney in fact authorized by them to bring this suit under Section 16 (b) of the Fair Labor Standards Act of 1938."

124 Mr. Flanagan:

We next offer in evidence Paragraph Five of the Agreed Statement of Facts, as follows:

"It Is Agreed that by a common understanding between defendant and the said red caps and between themselves, the red caps wear and did during the period referred to in plaintiff's second amended complaint wear uniform blue shirts and red caps furnished by themselves."

Mr. Flanagan:

We next offer in evidence Paragraph Six of the Agreed Statement of Facts:

"It Is Agreed that Plaintiff's Exhibit "A" attached hereto is a true and correct copy of a collective working agreement in force and effect after January 1, 1940, between the defendant and the red caps mentioned in plaintiff's second amended complaint and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, and executed by A. J. Pickett, General Chairman, and executed by defendant's Vice-President and General Manager, Murrell L. Buckner. It is agreed that Exhibit "A" represents the first collective working agreement entered into between the defendant and said red caps or Brotherhood."

Mr. Flanagan:

We next offer in evidence Paragraph Seven of the Agreed Statement of Facts, as follows:

"It Is Agreed that the following is a true and correct copy of the original letter directed and delivered by the defendant to each of the red caps named in plaintiff's amended complaint on October 22, 1938. (Being Exhibit "F" attached hereto.)

125 "Dallas, Texas, October 22, 1938.

"To: Red Caps,
The Union Terminal Company.

"In view of the requirements of the Fair Labor Standards Acts, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amount received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to en-

gage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

"THE UNION TERMINAL COMPANY,
By MURRELL L. BUCKNER,
Vice-President & Gen. Manager."

Mr. Flanagan:

We next offer in evidence Paragraph Eight of the Agreed Statement of Facts, as follows:

"It Is Agreed that the following is a true and correct copy of the original letter received by the defendant on October 24, 1938, and that it was directed to the defendant by A. J. Pickett, General Chairman, and said letter may be treated as though it were the original letter:

"The Union Terminal Company System Board of Adjustment Brotherhood of Railway and Steamship Clerks,

126 A. J. Pickett, General Chairman,
709 Equitable Building,
St. Louis, Mo.

"October 24, 1938.

"Mr. Murrell L. Buckner,
Vice-President and General Manager
The Union Terminal Company,
Dallas, Texas.

"Dear Sir:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22, 1938, and which

was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by persons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"Fair Labor Standards Act:

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest

against the method proposed by the carrier to meet its obligation under the said law, and since it ap-
127 pears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein.

"Yours truly,

"(Sgd.) A. J. PICKETT,

General Chairman."

Mr. Flanagan:

We next offer Paragraph Nine of the Agreed Statement of Facts, as follows:

"It Is Agreed that subsequently to the letter set out above in Paragraph VII, defendant prepared and furnished to the red caps, 'Red Cap Time Slip' forms, one of said forms being attached hereto and marked Exhibit "B"; that defendant required the said red caps to fill in the blanks of said forms and to return one of said forms filled in showing hours worked and tips collected during the day, for each day worked thereafter through February 28, 1939. That prior to March 1, 1939, defendant prepared and furnished to the red caps, 'Red Cap Time Slip' forms, one of said forms being attached hereto and marked Exhibit "C"; that prior to March 1, 1939, defendant advised the red caps that defendant would assume unless reported to the contrary, that for each work period after February 28, 1939, each red cap collected in tips at least an amount equivalent to the number of hours worked multiplied by twenty-five cents (25 cents), and that should any red cap receive less than said amount during any work period he should report it to defendant and defendant would pay to such red cap an amount equal to the difference between
128 the amount of the tips collected and the amount represented by multiplying the number of hours

worked by twenty-five cents (25¢) and further that each of said red caps should fill in one of said forms showing the hours worked during the day for each day worked. It is agreed that during the period from March 1, 1939, to October 15, 1939, inclusive, each of said red caps collected in tips during each work period an amount equal to or in excess of the number of hours worked during the work period multiplied by twenty-five cents (25¢). It is agreed that defendant prior to October 16, 1939, furnished to the red caps the 'Red Cap Time Slip' forms as attached hereto marked Exhibit "D" and instructed the red caps that on and after October 16, 1939, each of them was to fill in the blanks on said forms and return to defendant showing the number of hours worked and the amount of tips collected during the day.

"It is further agreed that during the period from October 24, 1938, through February 28, 1939, and from October 16, 1939, through March 6, 1940, each of said red caps did fill in and return to defendant each day worked one of said 'Red Cap Time Slip' forms using the form of Exhibit "B" for the former period and the form of Exhibit "D" for the latter period, showing the number of hours worked and the amount of tips collected during the day; that during the period from March 1, 1939, through October 15, 1939, each of said red caps did fill in and return to the defendant each day one of said 'Red Cap Time Slip' forms attached hereto
129 marked Exhibit "C", showing the number of hours worked during the day. It is agreed that defendant kept a payroll record of the information reflected in said Exhibits "B" and "C" and "D" for such period beginning October 24, 1938, and through March 6, 1940.

"It is agreed that during the period from October 24, 1938, through October 23, 1939, that defendant stood

ready to and did pay to each red cap, for each work period during which the amount of tips collected by said red cap amounted to less than the number of hours worked multiplied by twenty-five cents (25¢), an amount equal to the difference between the amount of tips collected and the number of hours worked multiplied by twenty-five cents (25¢); that during the period from October 24, 1939, through March 6, 1940, defendant stood ready to and did pay to each red cap, for each work period during which the amount of tips collected by such red cap was less than the number of hours worked multiplied by thirty cents (30¢), an amount equal to the difference between the amount of tips collected and the number of hours worked multiplied by thirty cents (30¢)."

Mr. Flanagan:

We next offer in evidence Paragraph Ten of the Agreed Statement of Facts, as follows:

"It Is Agreed that prior to and during the period referred to in plaintiff's second amended complaint, defendant prepared and furnished to the red caps, 'Red Cap Checks', a true copy of which is attached hereto marked Exhibit "E". Said checks were and are used by the red caps in handling the baggage and effects of persons using defendant's station where said persons do not accompany the red cap."

130 "When the red cap accompanies the person whose baggage or effects he is carrying such checks are not used. Such checks are not and have no connection with the baggage checks given for baggage delivered for transportation under the baggage tariffs and carried in the baggage car."

Mr. Flanagan:

We next offer in evidence Paragraph Eleven of the Agreed Statement of Facts, as follows:

"From And After October 28, 1938, defendant issued free transportation to the red caps upon application by them. A true copy of the application form used is hereto attached marked Exhibit "G"."

Mr. Flanagan:

We next offer in evidence Paragraph Twelve of the Agreed Statement of Facts:

"It Is Agreed that this Agreed Statement of Facts and also the exhibits referred to herein may be introduced in evidence by either party and all matters and things therein contained considered in evidence as though formally introduced in evidence through other means, subject to objection by either party on the grounds of irrelevancy and immateriality, and no other.

"It Is Further Agreed that both parties reserve the right to introduce such other evidence at the trial as they may desire not inconsistent with this stipulation."

(Said Agreed Statement of Facts were signed by the following parties:)

W. T. SAVAGE,
CHARLES M. HAY,
S. D. FLANAGAN,
E. D. (?) FRANEY,
Attorneys for Plaintiff.

ROBERT G. PAYNE,
GUS M. HODGES,
JOHN C. ROBERTSON,
Attorneys for Defendant.

Mr. Flanagan:

We offer in evidence the various exhibits that are referred to in that Agreed Statement of Facts. The first one is Exhibit "A" which is the Union Terminal Company's working agreement between The Union Terminal Company and Brotherhood of Railway Clerks and Steamship Clerks, etc. This is marked PLAINTIFF'S EXHIBIT "A", and I particularly call attention to Rule 16, which is found on Page Eight, and which reads as follows:

"If the final decision decrees that the charges against the Red Caps were not sustained, the record shall be cleared of the charge; if suspended or dismissed the red cap shall be reinstated with seniority and rights unimpaired. The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the "Fair Labor Standards Act", the carrier is required to pay a wage to the red cap over and above any amounts that may be received by them as tips. (Note.) This rule shall not be construed as requiring the carrier to reimburse red caps for loss of tips, either now or in the future."

132 I call that to Your Honor's attention. First, it refers to these men as employees, and, secondly, it shows that the question now involved is an open question, considered an open question between the parties, wherein the red caps were contending that they come under the law, and the company apparently that they were not.

I also call Your Honor's attention to Rule No. 23, as follows:

"Red Caps and those dependent upon them for support will be given the same consideration in requesting free transportation as is granted others in the service.

"General committees representing Red Caps will be granted the same consideration in requesting transportation as is granted general committees representing employees."

Then I call Your Honor's attention to Page 12 at the conclusion of the agreement where it shows, "Accepted for Union Terminal Company, W. C. Young, Station Master."

And then, "Approved: Murrell L. Buckner, Vice-President and General Manager, The Union Terminal Company."

And following that: "Accepted for the employees and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (and signed by) A. J. Pickett, General Chairman. D. W. Estes, Division Chairman. L. H. Akers, Assistant General Chairman. Harry M. Barton, Committeeman. Clinton Hynson, Committeeman. James Foster, Committeeman. Dallas, Texas, January 1, 1940."

133 Mr. Flanagan:

We next offer in evidence Exhibit "B", PLAINTIFF'S EXHIBIT "B", which is the time slip referred to in the Agreed Statement of Facts, and it is captioned, "The Union Terminal Company Red Cap Time Slip." Then it has the name with a blank line and the number referring to the number of red caps. The hours worked from ..... to ..... Tips received $..... Date..... And then says:

"I hereby certify and affirm that I did on the above date receive from divers persons the total sum of $..... for services performed in my capacity as red cap, while

in the employ of the Union Terminal Company, that the above statement is correct and that I worked on said date only the hours stated."

And then a blank line and then right under it the words, "Red Cap."

Mr. Flanagan:

We next offer in evidence PLAINTIFF'S EXHIBIT "C", which is also a time slip but a little different from the one just read, and it reads:

"The Union Terminal Company. Date ..... Hours on duty from ..... M. to ..... M., showing four of those lines."

And then says: "Total hours worked" ....., and then a blank line to be signed by the Red Cap and right under it the words, "Red Cap".

I call attention to the fact that on this slip there is no provision for reporting the tips. That, I think, was the one used between March 1, 1939, and October 15, 1939.

134 Mr. Flanagan:

We also offer PLAINTIFF'S EXHIBIT "D", which is another Red Cap time slip, and the language of that is practically the same as the language in Plaintiff's Exhibit "B", the first time slip I read.

I next offer in evidence PLAINTIFF'S EXHIBIT "E", which is a baggage check that was referred to. It shows on this the number of the baggage check and says, "In case of error advise by wire without fail and return to Station Master The Union Terminal Company, Dallas, Texas."

And on the opposite side the number and, "In case of error advise by wire without fail and return to Station Master, The Union Terminal Company, Dallas, Texas."

(That is a stub to the one first quoted.)

On the reverse side of this exhibit it shows, "Porter No. ..... Car ..... Sec. ..... Train ..... and Date ....."

Mr. Flanagan:

We next offer in evidence PLAINTIFF'S EXHIBIT "F", which is a letter dated October 22, 1938, and which I read to Your Honor from the Agreed Statement of Facts. (To which reference is here made.) That was a letter that was given to each of the employees by the Company.

We also offer in evidence the letter set out in the Agreed Statement of Facts in answer to that, and which does not have an exhibit number, because it was agreed that we set it out as an original in the agreed statement.

Mr. Payne:

We object to that letter purely and solely on the ground of its immateriality. I suppose Your Honor would not consider it if it is immaterial anyway.

135 The Court:

It is presented by both sides as an alleged ground for estoppel, or whatever might be found, and I overrule the objection.

Mr. Flanagan:

Now, if Your Honor please, we offer in evidence PLAINTIFF'S EXHIBIT "G", which is an application for transportation or free passes, and it reads:

"Form 26. The Union Terminal Company's Employees Application for Transportation. Employees, in making request for transportation will please bear in mind the following general conditions: Employees in service less than six months will not be furnished with transportation."

And then there is a blank line for the date of the application and the official of the company's name it is addressed to, and says: "Please furnish me transportation consistent with this company's rules", and in parenthesis, show names of ages of children and indicate sex. And then it has the word "For" and a blank after it, and "From blank to blank and return and from blank to blank and return via blank, and good until blank." And says, "I hereby certify that the above named person is my ....., a member of my family, residing with me, and entirely dependent upon me for support, (unemployed) and understand that the interstate commerce law permits issuance of interstate transportation only to railroad employees and dependent members of their families, and that any person not entitled thereto under the law who uses free or reduced rate transportation is subject to a penalty of from $100.00 to $2,000 for each offense. This is my ..... Application during the calendar year ....." And says, "This form is printed in order to eliminate the necessity for letters of transmittal. The purpose should be observed."

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And it shows a place for the applicant to sign and a place for the party to sign approving the application.

Mr. Flanagan:

I call Your Honor's attention to the Agreed Statement of Facts which shows in Section 11 that they were issuing these free passes from and after October 28, 1938.

Now, if Your Honor please, since we drew up this Agreed Statement of Facts, there have been some other letters that are pertinent to certain issues, and we agreed that we might read them without the necessity of putting witnesses on the stand, and treat them in the same manner as we treated these other exhibits, subject to the objection as to their immateriality, etc., of course.

Mr. Flanagan:

We next offer in evidence, if Your Honor please, Plaintiff's Exhibit "H", which is a letter addressed to The Union Terminal Company, Dallas, Texas, and signed by each of the Red Caps involved in this suit, notifying the company that Mr. A. J. Pickett was acting in their behalf for the purpose of discussing a working agreement such as is indicated in Exhibit "A", which is as follows:

137 PLAINTIFF'S EXHIBIT "H".

Dallas, Texas, October 11, 1938.

To The Union Terminal Company,
Dallas, Texas.

Greetings:

The Undersigned, Employed by the Union Terminal Company, Dallas, Texas, in the capacity of "Red Caps", do hereby and herewith, designate the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station, as our duly authorized and accredited representative for the purposes set out in the several sections of the Railway Labor Act, 1934, Amended, and the said organization is hereby authorized to enter

into negotiations with our employer, for the purpose of making a working agreement covering our conditions of employment, and to do any and all other things in connection therewith that will have for its purpose the making and maintenance of an agreement between the carrier and its undersigned employees. This authorization is irrevocable, unless and until a majority of the employees shall have invalidated its force and effect as provided for in the Railway Labor Act, 1934, Amended:

Name—Address.

Everett Matthews, 3014 State Street.
Joe Jackson, 1525 Juliette St.
O. A. Alexander, 2400 Metropolitan St.
J. W. Fuller, 3709 Atlanta St.
Harry Barton (28), 2212 Caddo St.
138 Adolphus Wells (42), 2837 Oakdale St.
Williams McMurray (27) 200 Flora St.
Frank Bailey (54).
J. W. Brigham (19), 1136 N. Bitterton Circle.
Alfonso Connor (29), 4204 Shenandoah.
Columbus Jackson (24), 2417 So. Harwood St.
Charles Muckleror, 3519 Meadow St.
Nelson Turner, 1914 Johnson St.
Terry Guy (?), 1016 Dodd St.
Phillip Jackson (13).
Charlie Lan (?), 3513 Lafayette St.
J. C. Franks, 2600 Caddo St.
Clinton Hynson (?), 3701 Watt St.
Haywood Hurt (?), 1811 Ball St.
Tilson W. Cameron, 112 Cliff St.
Paul W. Brigham, 1136 N. Bitterton Circle.
Isaac Sam Johnson, 3500 Edgewood St.
Arthur May, 3033 Thomas Ave.
Oscar Morris, 917 Bogel St.

Allen Thomas, 3112½ Thomas Ave.
Russell Elston, 1205 Dey St.
Cornulius Bushy, 3421 State St.
Donald Spears, 1912½ Boll.
Harry Barton (53), 2709 Munger St.
139 Richard J. Williams, 3026 Warren Ave.
Silas Kelton, 2711 Munger St.
A. R. Johnson (32), 3400 Edgewood St.
Nathon McGrath, 1400 Daile.
Jim Morgan, 3308 Cockran.
L. T. Price (Prince) (50), 1907 N. Washington.
Theodore Jones (44), 2304 Caddo.
Lens Brooks (35), 3703 Havana St.
James Foster (20), 1114 Dale St.
C. H. Robertson (7), 2711 Munger Ave.
Lawrence McNeil, 3911, 3911 Munger Ave.
Sam H. Williams (58), 2711 Munger Ave.
Frank Southern (14), 2231 Dathe St.
Scott Campbell (30), 2417 Allen St.
John A. Jefferson (17), 4116 Sutton St.
J. C. Curry (8), 1535 Caldwell.
J. T. Turpin (43), 1807 Fairmount St.
Nelson Fields (51), 3500 Edgewood St.
Earnest Arnold, 3614 State St.
Ulyssus Hollingsworth (52), 4008 Munger St.
Dave Campbell (31), 3715 Meadow St.

Mr. Flanagan:

We next offer in evidence, Plaintiff's Exhibit "I", being a letter dated October 11, 1938, addressed to Murrell Buckner and signed by A. J. Pickett with reference to ICC Ex Parte No. 72, Order of September 29, 1938, which is as follows:

140 PLAINTIFF'S EXHIBIT "I".

October 11, 1938.

Subject: ICC Ex Parte No. 72 (Sub-No. 1) Order of September 29, 1938, including Employes carried as Red Caps under the Railway Labor Act.

Mr. Murrell L. Buckner,
Vice-President and General Manager,
The Union Terminal Company,
Dallas, Texas.

Dear Sir:

By approximate order, the Interstate Commerce Commission did on September 29, 1939, find that "Red Caps" were employees of the carrier within the meaning of Paragraph 5 of Section 1 of the Railway Labor Act—Amended—1934, and because of the findings of the Commission those employees are privileged under the law to organize themselves into an appropriate bargaining agency and thru the agency selected enter into contractual relations with the carrier respecting the terms of their employment.

The several employees, termed "Red Caps" by the Union Terminal Company, Dallas, Texas, have by appropriate action authorized the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employees, to represent them in the making of a working agreement as contemplated by the Railway Labor Act—1934—Amended, and we are therefore serving notice upon the carrier this day, of the action of the employees, and advis-

141 ing the carrier that we are prepared to exhibit to it the authorizations that we hold executed

by the employees in question, and we are asking for a conference under the terms of the Railway Labor Act—1934—Amended, for the following purposes:

(1) To exhibit to the carrier the authorizations that we hold executed by the employees, authorizing us to act for them.

(2) For the purpose of negotiating an agreement covering their working conditions and other related subjects.

Please advise me time, date and place that it will be agreeable to hold the conference for the purposes set forth in the foregoing.

Yours truly,

A. J. PICKETT,
General Chairman.

Mr. Flanagan:

We next offer in evidence Exhibit "J", a letter dated December 26, 1938, addressed to Mr. Murrell L. Buckner, Vice-President and General Manager of The Union Terminal Company, Dallas, Texas, which is as follows:

PLAINTIFF'S EXHIBIT "J".

December 26, 1938.

Mr. Murrell L. Buckner,
Vice-President and General Manager,
The Union Terminal Company,
Dallas, Texas.

Dear Mr. Buckner:

Enclosed you will find a draft of the proposed
142 agreement as requested covering the Red Caps.

I am suggesting that we have our initial conference on the agreement on Thursday of this week beginning at 10:00 A. M. I suggest this for the reason that it is necessary for me to be in Chicago on the 4th of January. On the 17th I have a meeting with Grand

Lodge Officers, on the 11th I must meet with our Hospital Board and on the 15th the Annual Meeting of my Board occurs.

Inasmuch as the Texas Legislature will convene shortly after January 1st, I presume that you will be engaged with that body.

I am sure that we can get the matter out of the way in a very short time. Unless I otherwise hear from you I will arrange to be in Dallas on Thursday morning; if this is not satisfactory, will you please wire me by MKT wire at my St. Louis Office?

Thanking you for your advice, I am

Very truly yours,

A. J. PICKETT.

Mr. Flanagan:

We next offer in evidence Exhibits "J-1", "J-2", "J-3", "J-4" and "J-5", being proposed agreement referred to in the letter just read, which exhibits are as follows:

PLAINTIFF'S EXHIBIT "J-1".

Agreement

between

143 The Union Terminal Company

and

Its Red Caps, Ushers, Attendants and All Others Engaged in Handling Hand Baggage to and from Passenger Trains, and Otherwise Assisting Passengers in a Similar Capacity,

Represented by

Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Rule 1: The rules hereinafter incorporated in this agreement, shall govern the hours of service and work-

ing conditions of the employees of the Union Terminal Company, Dallas, Texas, who are engaged in the handling of hand baggage to and from passenger trains, assisting passengers in and around the station, and performing similar duties, and who shall for the purpose of this agreement be designated as "Red Caps".

Rule 2: Seniority of each employee shall begin at the time service as a Red Cap first begins under the rules of this agreement.

Rule 3: The application of employees shall be approved or disapproved within sixty days after beginning employment.

(It is understood and agreed that all employees now in the service will be considered as being permanently employed without respect to the provisions of this rule.)

Rule 4: Senior employees will have preference in selecting their work assignment. After an employee has designated the shift or assignment upon which he desires to perform service, he may not for a period of ninety days further exercise his seniority rights.

Rule 5: A seniority roster will be posted in January of each year showing the respective standing of each employee. The roster will be open for protest for a period of thirty days after posting and if error exists the carrier will issue a bulletin correcting the error.

(The roster posted in January, 1939, will be open for protest for a period of sixty days, and the dating of each employee will be considered as established unless protest is made within the time limit herein provided.)

Rule 6: All employees covered by this agreement will be embraced in one seniority district.

Rule 7: When forces are reduced seniority shall govern. The junior employees or employee being the first to go out of service in the order of their seniority standing.

Rule 8: When forces are increased employees who have been cut off on account of force reductions will be called back to work, provided, such employee will have filed his name and address with the proper supervising official of the carrier, and will have kept the carrier advised of any change in his address. Employees failing to report for duty within five days after having been notified by mail, telegram or messenger shall be considered out of the service.

Rule 9: Employees who re-enter the service after having resigned, or having failed to comply with Rule 8 will be considered new employees and their seniority will date from their last entry into service.

Rule 10: Eight hours or less shall be considered a day's work.

Rule 11: If as and when it is determined that the employee covered by this agreement are likewise covered by the "Fair Labor Standards Act", time after eight hours on any one day will be paid for at the rate of time and one-half time.

Rule 12: The hours of assignment for each shift or employee will be consecutive, unless by agreement with the duly accredited representative of the employee's.

Rule 13: Employees covered by this agreement will not be required to perform service in any other class or group of employees, nor will employees covered by this agreement be permitted to "double" unless in cases of extreme emergency.

Rule 14: An Extra Board will be maintained and its operations shall be governed by the rules heretofore established for the government of employees employed as Clerks, etc.

145 Rule 15: Employees holding places on the Extra Board will be considered in the employ of the carrier and covered by all rules of this agreement.

Rule 16: Employees covered by these rules will not be disciplined or dismissed without an investigation. The charge against the employee shall be made in writing, and the causes for which must have occurred within sixty days prior to the date of the charge. At the investigation or at subsequent hearing the employee may be represented by the Officers of the organization party to this agreement. At the investigation or at the hearings the employee may produce witnesses, or documents in defense of the charge made. The hearing or investigation shall be one of record, and a copy of the record will be furnished the representatives of the employees. If the charge against the employee is not sustained he shall be reinstated and compensated for all losses sustained, and his record will be cleared of the charge.

It is hereby agreed that the right of appeal to the highest officer of the carrier is hereby established.

Employees who consider themselves otherwise unjustly treated will have the same right of hearing and appeal

as is provided for in this rule, provided, written complaint is made to the proper officer of the carrier within ten days from the cause for complaint.

Rule 17: It is understood and agreed that employees who may elect to handle their cases or grievances individually must, before the carrier can act, comply with all rules of the agreement in the same respect as though the case or grievances were being handled by the organization.

Rule 18: Employees covered by this agreement may be allowed a leave of absence for a period not to exceed sixty days in any calendar year. Leaves of absence in excess of sixty days will only be granted by agreement between the carrier and the duly accredited representatives of the organization representing the employees. (This rule will not apply in cases of sickness or injury.)

146 Rule 19: Employees elected as representatives of the employees will be granted necessary leave of absence for the handling, or consideration of grievances or cases that arise under the rules of this agreement.

Rule 20: Except in the case of extra men called to perform work of another employee, work performed on Sundays and Holidays will be guaranteed at pro rata rates, provided employment existed for the employee on the six days prior to the Sunday or Holiday. This rule shall not apply to new positions or to employees who may exercise rights under the rules of this agreement, or to extra men called to perform the work of another.

Rule 21: Nothing in these rules shall permit the reductions days for employees covered thereby, below six

per week, if assigned on a six day basis. If assigned on a seven day basis, the working week shall be seven days.

Seven day assignments shall exist for a period of not less than thirty days.

PLAINTIFF'S EXHIBIT "J-4".

Rule 22: There shall be no discrimination in the assignment of work, nor shall the carrier discriminate against any employee because of membership in a labor organization.

Rule 23: Employees who are selected as Captains of Shifts or gangs will be allowed a differential of $1.50 per day over and above the guarantee, and they shall be selected from the group by agreement between the carrier and the duly accredited representative of the employees.

Rule 24: It is agreed and understood, that the employees covered by this agreement are employed by and under the direct supervision of the officials of the carrier, and that the employees shall not be restricted in their work, nor shall they be required to perform service on orders other than those issued by the Officers of the Union Terminal Company.

147 Rule 25: Employees required to perform service as messengers away from the property of the carrier shall be allowed a differential over the guarantee of fifty cents per hour, with a guaranteed minimum of one hour for such service performed.

This rule contemplates similar service in connnection with private cars, or any other work at the direction of the carrier away from the property of the carrier.

Rule 26: Employees covered by this agreement will be accorded the same right to request transportation as is accorded other employees in the service.

Rule 27: It is agreed that the employees will keep themselves neat and clean, and to accomplish this, the carrier will furnish clean warm dressing rooms for the convenience of the employees.

Rule 28: Employees required to attend Court or serve as witnesses for the carrier will receive for such service their usual allowance and in addition their expenses, provided they assign to the carrier all fees and mileage that may accrue to them as witnesses.

Rule 29: Employees covered by this agreement will have the same rights to hospital service, and group insurance as is accorded other employees in the service.

Rule 30: This schedule of rules will be printed by the carrier and a copy given to each employee covered thereby. When a new employee is engaged he will be given a copy of the agreement at the time he is employed.

Rule 31: It is agreed that employees who may be injured in the service may be represented in the settlement of the matter by the duly accredited representative of the employees. Employees who are injured in the service will not be required to sign a release before being permitted to return to service.

148 PLAINTIFF'S EXHIBIT "J-5".

Addition Rule 21: Shifts and assignments shall have a regular starting time, and the starting time of any shift or assignment, will not be changed without sixteen hours advanced notice to the employees affected, unless the proposed change is agreed to by and between the carrier and the duly accredited representatives of the employees.

Rule 32: This agreement and the rules and provisions embraced herein shall constitute an agreement in their entirety between the parties designated in the caption of this document, and shall be effective January 1, 1938, and shall continue in effect until changes as provided for in the Railway Labor Act—1934 Amended.

For the Union Terminal Company,

.....

Vice-President & General Manager.

For the Employees,

.....

General Chairman.

.....

Division Chairman.

.....

.....

.....

Committee, Representing the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees.

Dated at Dallas, Texas.

Mr. Flanagan:

Now I wish to read in evidence EXHIBIT "K", a letter dated October 5, 1939, addressed to Murrell L. Buckner, Vice-President and General Manager of The Union Terminal Company, Dallas, Texas, reading as follows:

149 Dear Sir: With further reference to our several exchanges relative to working agreement covering Red Cap employees:

"We have previously furnished you with a copy of our proposal covering this question.

"We are now being called upon to proceed with the negotiation of agreement covering the working conditions of the employees in question.

"We have previously exhibited to the carrier our authority under the law to represent the Red Caps in agreement negotiations.

"Will you therefore please advise me the time, place and date that you are agreeable to entering into negotiations for the purpose of disposing of the matter, under the provisions of the Railway Labor Act—1934 Amended."

"Thanking you for your advice, I am

"Very truly yours,

"A. J. PICKETT."

Mr. Flanagan:

I next offer in evidence PLAINTIFF'S EXHIBIT "L", which is a letter dated Dallas, Texas, October 6, 1939, addressed to Mr. A. J. Pickett as follows:

"Your letter of October 5 in our conversation yesterday. I am taking this matter up today with the execu-

tives and hope to have something definite shortly and will then advise you further.

"Very truly yours,

"MURRELL L. BUCKNER".

150 Mr. Flanagan:

I next offer in evidence Plaintiff's Exhibit "M", being a letter from Murrell L. Buckner, dated December 6, 1937, to A. J. Pickett, which is as follows:

PLAINTIFF'S EXHIBIT "M".

The Union Terminal Company,
Murrell L. Buckner,
Vice-President and General Manager.

Dallas, Texas, December 6, 1939.

Mr. A. J. Pickett,
General Chairman, B. of R. C.,
Box P, Plaza Station,
St. Louis, Mo.

Dear Mr. Pickett:

Referring to our conversation and letter which you showed me from Mr. Harrison in reference to the Kansas City Terminal agreement with the Red Caps.

I have carefully read this agreement and I see nothing in it that is in any way out of line, except that Rule 6 would not apply to this property and Rule 17 is not clear.

As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Court and as soon as same is decided we will be glad to negotiate an agree-

ment with the Clerks Union, of which you are the General Chairman for this Company.

Very truly yours,
(Signed) MURRELL L. BUCKNER.

151 Mr. Flanagan:

I next offer in evidence Plaintiff's Exhibit "N", which is a certified copy of the findings and order of the Interstate Commerce Commission, and as follows:-

PLAINTIFF'S EXHIBIT "N".

Interstate Commerce Commission,
Washington.

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of notice of the Commission dated December 20, 1937, and attachments, in Docket No. Ex Parte 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 22nd day of May, A. D. 1940.

(Seal)

W. P. BARTEL,
Secretary of the Interstate Commerce Commission.

December 20, 1937.

Service of the attached orders and questionnaire is hereby made on the following named carriers, which

have no designated agents in Washington, D. C.,
152 by posting same in the office of the Secretary of the Interstate Commerce Commission.

W. P. BARTEL,
Secretary.

Chicago Union Station Company.
Cleveland Union Terminals Company.
Dayton Union Railway Company.
Detroit Union Railroad Depot and Station Company.
Fort Street Union Depot Company.
Fort Worth Union Passenger Station Company.
Memphis Union Station Company.
Norfolk Terminal Railway Company.
Port Terminal Railroad Association.
Rock Island Frisco Terminal Railway Company.
Union Depot Company.
Union Passenger Depot Company of Galveston.
Union Terminal Company.
Wichita Union Terminal Railway Company.

ORDER.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 18th day of October, A. D. 1937.

Ex Parte 72 (Sub-No. 1).

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act.

153 The Commission having been requested to determine whether so-called "red caps", station

porters, station attendants, parcel porters, ushers, and other persons whose duties consist of or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties, are employees of the carriers within the meaning of the fifth paragraph of section 1 of the Railway Labor Act.

It is Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this Commission, be, and it is hereby, Ordered and Directed to furnish the information called for in the attached questionnaire with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census, and return the same properly sworn to as indicated in the questionnaire not later than December 15, 1937.

It is further Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this Commission be made parties to this proceeding, also that a copy of this order be served upon each such carrier, and that notice of this order be given to the general public by depositing a copy of the same in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 3.

W. P. BARTEL,
Secretary.

(Seal)

154 Interstate Commerce Commission,
Washington, D. C.

Ex Parte 72 (Sub-No. 1).

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act.

Subject: Hand baggage porters.

Note.—The term "hand baggage porters" as used in this questionnaire means persons whose duties consist of, or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties. These men are variously designated by terms such as "red caps", "station porters", "station attendants", "parcel porters", "ushers", "chief ushers", "captains", etc. They are divided into two classes, A and B, as shown below. It is desired that all questions be answered as to both classes.

Questionnaire.

Exact name of reporting carrier.

.....

Name, title, and address of officer of respondent to whom correspondence concerning this report should be addressed.

.....

(Name)

.....

(Title)

.....

(Address)

Name of station .....

Location of station .....
(City) (State)

155 Class A.

Hand Baggage Porters Who Are Paid Salaries, Wages, or Other Compensation by Respondent.

1. Total number employed on September 1, 1937?

2. By what title or titles are they designated?

A. .....

B. .....

C. .....

3. Their duties, if any, in addition to carrying hand baggage and other articles for passengers?

A. .....

B. .....

C. .....

4. Average number of hours in service per person?

A. Per day .....

B. Per week .....

C. Per month .....

156 5. Salary or wages?

A. Per hour .....

B. Per day .....

C. Per week .....

D. Per month .....

(The entries under 4 and 5 should be in accord with the basis usually employed at the station for which the report is made.)

6. What was the total amount of compensation received from the carrier for services of such employees at the station covered by the return during the month of September, 1937?

7. What was the total number employed at such station during the whole or any part of the same month?

8. Do they also receive tips?

9. Are they permitted to solicit tips?

10. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

11. Are they considered eligible to receive passes?

12. The number who have received passes during the current year?

13. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

14. Who bears the expense of the uniforms, etc., worn?

16. Give title or position of officers or employees under whose supervision hand baggage porters perform services.

17. Are they required to make any kind of application for employment? If so, submit copy of application form and state by whom application must be approved.

157 18. Are they required to pass an examination?

19. Are they subject to certain rules? If so, submit copy of rules.

20. Is discipline imposed for breach of rules? If so, nature of discipline.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.

22. Are any seniority rights or preferences accorded them, based on length of service? If so, specify briefly.

23. Summarize briefly any agreements between carrier and labor organizations regarding wages, rules, and working conditions of persons covered by return.

24. Number who are conceded by the carrier to be employees.

If some are conceded to be employees and others are not, state the distinction.

Class B.

Hand Baggage Porters Who Receive No Compensation Other Than Tips.

1. Total number in service on September 1, 1937?

2. By what title or titles are they designated?

A. .....

B. .....

C. .....

3. Average number of hours in service per person?

A. Per day .....

B. Per week .....

C. Per month .....

158 4. Their duties, if any in addition to carrying hand baggage and other articles for passengers?

A. .....

B. .....

C. .....

5. Are they considered eligible to receive passes?

6. The number who have received passes during the current year?

7. What officer or employees assigns these persons to the service?

8. Give title or position of officers or employees under whose supervision hand baggage porters perform their services?

9. Are they required to make any kind of application? If so, submit copy of application form and state by whom it must be approved.

10. Are they required to pass an examination? If so, state nature of examination.

11. Are they subject to certain rules? If so, submit copy of rules.

12. Is discipline imposed for breach of rules? If so, nature of discipline.

13. Are they disciplined for improper service to passengers? If so, nature of discipline.

14. Are they permitted to solicit tips?

15. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

16. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

159 17. Who bears the expense of the uniforms, etc., worn?

18. Are any required to pay for the privilege of acting as hand baggage porters?

19. If the services of hand baggage porters are engaged by a concessionnaire, so state.

20. Are any seniority rights or preferences accorded them, based on length of service? If so, specify briefly.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.

22. Have any been paid salaries, wages, or other compensation since enactment of the Railway Labor Act on May 20, 1926? If so, state number and other details.

23. Have the salaries, wages, or other compensation of any such persons been discontinued during or since Federal control? If so, state the number and other details.

24. Summarize briefly any agreements between carrier and any labor organizations regarding wages, rules, and working conditions of persons covered by return.

25. Number who are conceded by the carrier to be employees. If some are conceded to be employees and others not, state the distinction.

Note:—If insufficient space is shown for any answer, the additional information may be shown on a supplemental sheet affixed to the questionnaire. Copies of this

questionnaire sufficient for the probable requirements of the various carriers will accompany the order, but if additional copies are needed they will be furnished upon request.

160 Oath.

State of .....,
County of ....., ss.

I, ... (Name of Person), the undersigned, ... (Title) of the..... (Full name of reporting carrier) do on my oath declare that the foregoing returns have been prepared by me or under my direction from the books and records of said..... ..... (Full name of reporting carrier) and from such other sources of information as seemed necessary for complete statement of the facts; that I have carefully examined or caused to be examined each and every statement herewith submitted; and that all of said statements are true and correct to the best of my knowledge, information, and belief.

.....

Subscribed and sworn to before me this ..... day of ....., 19.....

.....

.....

161 ORDER.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 14th day of December, A. D. 1937.

Ex Parte 72 (Sub-No. 1).

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials That Are to be Included Within the Term "Employee" Under the Railway Labor Act.

It appearing, That by order dated October 16, 1937, returns to a questionnaire in the above-entitled docket concerning information in regard to so-called "red caps", station porters, station attendants, parcel porters, ushers, and other persons whose duties consist of, or include, carrying passengers' hand baggage or other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties, were required to be filed on or before December 15, 1937, by each Class I steam railroad, also each switching and terminal company, and by certain Class A electric railways with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census; and good cause appearing therefor:

It is Ordered, That the period for filing such returns be, and is hereby, extended to January 4, 1938.

By the Commission, Division 3.

W. P. BARTEL,
Secretary.

(Seal)

162 Mr. Flanagan:

We next offer in evidence Plaintiff's Exhibit "O", which is a certified copy of the Interstate Commerce Commission's Order, together with questionnaire filled out by the defendant company, said exhibit being as follows:

PLAINTIFF'S EXHIBIT "O".

Interstate Commerce Commission,
Washington.

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached are true copies of the following:

Order of the Commission entered October 16, 1937; and

Return to Questionnaire, filed January 10, 1938, by The Union Terminal Company,

in Ex Parte 72 (Sub-No. 1), In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be included within the term "Employee" under the Railway Labor Act, the originals of which are now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 29th day of April, A. D. 1940.

(Seal)

W. P. BARTEL,
Secretary of the Interstate
Commerce Commission.

163 ORDER.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 16th day of October, A. D. 1937.

Ex Parte 72 (Sub-No.1)

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials that are to be Included Within the Term "Employee" Under the Railway Labor Act.

The Commission having been requested to determine whether so-called "red caps", station porters, station attendants, parcel porters, ushers, and other persons whose duties consist of, or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties, are employees of the carriers within the meaning of the fifth paragraph of section 1 of the Railway Labor Act;

It is Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this Commission, be, and it is hereby, Ordered and directed to furnish the information called for in the attached questionnaire with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census, and return the same properly sworn to as indicated in the questionnaire not later than December 15, 1937.

164 It is further Ordered, That each class I steam railroad, also each switching and terminal company, and each class A electric railway reporting to this

Commission be made parties to this proceeding, also that a copy of this order be served upon each such carrier, and that notice of this order be given to the general public by depositing a copy of the same in the office of the Secretary of the Commission at Washington, D. C.

By the Commission, Division 3.

W. P. BARTEL,
(Seal) Secretary.

Interstate Commerce Commission,
Washington, D. C.

Ex Parte 72 (Sub-No. 1)

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials That Are to be Included Within the Term "Employee" Under the Railway Labor Act.

Subject: Hand baggage porters.

Note:—The term "hand baggage porters" as used in this questionnaire means persons whose duties consist of, or include, carrying passengers' hand baggage and other articles between trains, waiting rooms, ferries, and/or highway vehicles, together with those who supervise or direct the performance of such duties. These men are variously designated by terms such as "red caps", "station porters", "station attendants", "parcel porters", "ushers", "chief ushers", "captains", etc. They are divided into two classes, A and B, as shown below. It is desired that all questions be answered as to both classes.

165 Questionnaire.

Exact name of reporting carrier: The Union Terminal Company.

Name, title, and address of officer of respondent to whom correspondence concerning this report should be addressed: Murrel L. Buckner, Vice-President & General Manager, Dallas, Texas.

Name of station: The Union Station.

Location of station: Dallas, Texas.

Class A.

Hand Baggage Porters Who Are Paid Salaries, Wages, or Other Compensation by Respondent.

1. Total number employed on September 1, 1937.
None.

2. By what title or titles are they designated?
None.

3. Their duties, if any, in addition to carrying hand baggage and other articles for passengers.
None.

4. Average number of hours in service per person.
None.

5. Salary or wages.
None.

(The entries under 4 and 5 should be in record with the basis usually employed at the station for which the report is made.)

6. What was the total amount of compensation received from the carrier for services of such employees at

the station covered by the return during the month of September, 1937?

None.

7. What was the total number employed at such station during the whole or any part of the same month?

None.

166 8. Do they also receive tips?

None.

9. Are they permitted to solicit tips?

None.

10. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

None.

11. Are they considered eligible to receive passes?

None.

12. The number who have received passes during the current year.

None.

13. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

None.

14. Who bears the expense of the uniforms, etc., worn?

None.

16. Give title or position of officers or employees under whose supervision hand baggage porters perform their services.

None.

17. Are they required to make any kind of application for employment? If so, submit copy of application form and state by whom application must be approved.
None.

18. Are they required to pass an examination? If so, state nature of examination.
None.

19. Are they subject to certain rules? If so, submit copy of rules.
None.

167 20. Is discipline imposed for breach of rules? If so, nature of discipline.
None.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.
None.

22. Are any seniority rights or preference accorded them, based on length of service? If so, specify briefly.
None.

23. Summarize briefly any agreements between carrier and any labor organizations regarding wages, rules, and working conditions of persons covered by return.
None.

24. Number who are conceded by the carrier to be employees. If some are conceded to be employees and others are not, state the distinction.
None.

Class B.

Hand Baggage Porters Who Receive No Compensation Other Than Tips.

1. Total number in service on September 1, 1937.
53.

2. By what title or titles are they designated?
Red Caps.

3. Average number of hours in service per person.

a. Per day. 8 Hours.

b. Per week. 56 Hours.

c. Per month. 1680 Hours.

168 4. Their duties, if any, in addition to carrying hand baggage and other articles for passengers.

a. None.

5. Are they considered eligible to receive passes?
No.

6. The number who have received passes during the current years.
None.

7. What officer or employee assigns these persons to the service?
Station Master.

8. Give title or position of officers or employees under whose supervision hand baggage porters perform their services.

Station Master.

9. Are they required to make any kind of application? If so, submit copy of application form and state by whom it must be approved.

None.

10. Are they required to pass an examination? If so, state nature of examination.

None.

11. Are they subject to certain rules?

No.

12. Is discipline imposed for breach of rules? If so, nature of discipline.

If Red Cap is derelict in the performance of his duties he is no longer permitted to serve the traveling public.

13. Are they disciplined for improper service to passengers? If so, nature of discipline.

See answer to Question 12.

14. Are they permitted to solicit tips?

No.

15. Do you have any information regarding the amount of tips collected? If so, submit such information as is available for any representative period.

November 1937, $2216.89.

169 16. Are they required to wear a certain kind of uniform, cap, badge, or other identifying insignia? If so, give details.

Cap and Number.

17. Who bears the expense of the uniforms, etc., worn?
Red Caps.

18. Are any required to pay for the privilege of acting as hand baggage porters?
No.

19. If the services of hand baggage porters are engaged by a concessionnaire, so state.
No.

20. Are any seniority rights or preferences accorded them, based on length of service? If so, specify briefly.
None.

21. Are any of them members of any relief, benefit, hospital, or group insurance organization for employees of the carrier? If so, state number and other details briefly.
No.

22. Have any been paid salaries, wages, or other compensation since enactment of the Railway Labor Act on May 20, 1926? If so, state number and other details.
No.

23. Have the salaries, wages, or other compensation of any such persons been discontinued during or since Federal control? If so, state the number and other details.
None.

170 24. Summarize briefly any agreements between carrier and any labor organizations regarding wages, rules, and working conditions of persons covered by return.
None.

25. Number who are conceded by the carrier to be employees. If some are conceded to be employees and others not, state the distinction.

None.

Note:—If insufficient space is shown for any answer the additional information may be shown on supplemental sheet affixed to the questionnaire. Copies of this questionnaire sufficient for the probable requirements of the various carriers will accompany the order, but if additional copies are needed they will be furnished upon request.

State of Texas,
County of Dallas, ss.

I, Murrell L. Buckner, the undersigned, Vice-President and General Manager, of the The Union Terminal Company do on my oath declare that the foregoing returns have been prepared by me or under my direction from the books and records of said The Union Terminal Company and from such other sources of information as seemed necessary for complete statement of the facts; that I have carefully examined or caused to be examined each and every statement herewith submitted; and that all of said statements are true and correct to the best of my knowledge, information, and belief.

MURRELL L. BUCKNER.

171 Subscribed and sworn to before me this 7th day of January, 1938.

HAL K. BIARD,
Notary Public, Dallas,
Texas.

Mr. Flanagan:

We next offer in evidence Plaintiff's Exhibit "P", which is a certified copy of the Interstate Commerce Commission's findings and order in connection with the particular case referred to:

PLAINTIFF'S EXHIBIT "P".

Interstate Commerce Commission
Washington,

I, W. P. Bartel, Secretary of the Interstate Commerce Commission, do hereby certify that the attached is a true copy of report and order of the Commission, filed and entered September 29, 1938, in Ex Parte No. 72 (Sub-No. 1), In the Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included within Term "Employee" under the Railway Labor Act, the original of which is now on file and of record in the office of this Commission.

In Witness Whereof I have hereunto set my hand and affixed the Seal of said Commission this 30th day of April A. D. 1940.

W. P. BARTEL,
Secretary of the Interstate
Commerce Commission.

(Seal)

INTERSTATE COMMERCE COMMISSION.

172 Ex Parte No. 72 (Sub-No. 1.)

In the Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included Within Term "Employee" Under the Railway Labor Act.

Submitted July 14, 1938. Decided September 29, 1938.

The work defined as that of an employee or subordinate official in the orders of the Commission in effect, defining and classifying employees and subordinate officials, includes the work of persons whose duties consist of, or include the carrying of, passengers' hand baggage at passenger stations in cities of over 100,000 population throughout the United States, and who are variously designated by terms such as red caps, station attendants, station porters, parcel porters, ushers, chief ushers, and captains, and brings such persons within the term "employee" as used in the Railway Labor Act.

George M. Harrison, Horace A. Bacus, Willard S. Townsend, Boland L. Hosie, Leon M. Despres, Joseph M. McMillen, James L. Flynn, Frank Morrison, Fred H. Mandel, and George E. C. Hayes for petitioners.

C. C. Handy, Wallace E. Hughes, B. E. Dwinell, S. C. Murray, J. H. Wright, William Atwill, G. W. Knight, H. H. Bryrer, E. R. Brumley, L. P. McGuire, Sydney R. Prince, Jr., S. W. Sawyer, and T. P. Healy for respondents.

173 REPORT OF THE COMMISSON.

Division 3, Commissioners McManamy, Porter, and Miller McManamy, Commissioner:

Exceptions were filed to the report proposed by the examiners, and oral argument was heard.

Certain employee organizations have filed petitions requesting this Commission to amend or interpret its orders defining and classifying employees and subordinate officials so as to include the work of persons whose duties consist of, or include, carrying passengers' hand baggage and other articles at various passenger stations, and thus bring them within the term "employee" as defined in the fifth paragraph of section 1 of the Railway Labor Act, as amended, which reads as follows:

The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: * * * * *

A questionnaire was served upon all class I carriers and upon practically all railway terminal and station companies, requiring answers under oath to numer-
174 ous questions relative to persons as above described, together with those who direct or supervise the performance of their duties, and who are variously designated by such terms as "red caps", station porters, station attendants, parcel porters, ushers, chief

ushers, captains, and the like. This questionnaire called for the information desired with respect to each passenger station at all cities of over 100,000 population, based on the 1930 census. It provided for separate returns for persons receiving salaries or wages, designated as class A, and for persons whose only compensation is through tips, designated as class B. At the oral argument respondents waived any objection to submitting the proceeding upon the sworn returns to the questionnaire in lieu of oral hearing.

Returns to the questionnaire were filed by about 250 carriers, covering their operations at approximately 350 stations throughout the country. The returns cover information for slightly over 4,300 persons in classes A and B, of which approximately 1,150 are in class A. Some stations have all of these persons on a salary basis in class A, at other stations their only compensation is through tips, placing them in class B, and at still other stations there are persons in both classes. Of 178 stations having persons in one or both classes, 98 stations have a total of less than 10 per station, and there are only 41 stations having over 25. Included in the latter is one with 63 in class A and 345 in class B, one with none in class A and 258 in class B, and one with 75 in class A and none in class B.

175 These persons are accorded the various titles shown above and also other titles by the different companies. The predominating titles applied to both classes are "red caps", ushers, attendants, and porters. The term "red cap" is the one most extensively used for each class. Although some companies designate those in class A differently from those in class B, numerous other companies use the same term for both classes. For example, one company may designate those in class A as ushers and those in class B as red caps, but other companies designate

those in both classes as either ushers or red caps without distinction. Duties in addition to the carrying of passengers' hand baggage are frequently the basis for a distinction in titles. For the purpose of this report the term "red caps" will be used as embracive of all persons covered by the questionnaire, except as head red caps or captains may be specifically designated.

Generally, red caps in both classes are subject to rules, either verbal or written, particularly as regards safety of passengers and baggage, courtesy to passengers, and general conduct of the red caps. They are subject to reprimand, suspension, dismissal, or other penalties for infractions of the rules. At most stations the qualifications of each applicant are carefully considered, and at many of them an examination, written or physical, is required. At least one station company requires applications to be accompanied by a surety bond, the premium on which is paid by the company. At several of the large stations where detailed rules are provided, the red caps are required (1) to learn the time when trains are due
176 to arrive and leave the station, the location of various offices in the station, and other information, in order to intelligently answer inquiries made of them, (2) to ascertain if a passenger boarding a sleeping card has space reservation for that car, and (3) to report to the stationmaster any evidence of damage to baggage received by them under check from baggage cars and any accidents observed by them. In assisting passengers they are restricted to the station premises or to specified points a short distance outside of the station.

Both classes are subject to the general authority of the stationmaster, general manager, superintendent, or officer of similar rank, or their immediate assistants. In a few instances they are subject to the general authority of a division superintendent of a railroad. At the large stations

there are one or more persons designated as head red caps or captains, or by similar terms, who have some subordinate authority over the remainder of the red-cap force, such as the allocation of stations and the making of reports with respect to the time each red cap is on duty, and who sometimes not only recommended men for red-cap service but actually have authority to engage their services in the first instance, but after being engaged or assigned to duty they are all subject to the general supervision of some official of the railway or station company. There is no indication that the authority of any of the head red caps or captains is of a nature to bring them within the terms "official" as distinguished from
177 the term "employee or subordinate official" as used in the Railway Labor Act.

It appears that, except as to the captains or head red caps who do considerable supervising, the principal work of most of the persons in both classes consists of carrying hand baggage, although electric trucks are apparently used for moving such baggage to some extent. Their duties also frequently include moving such baggage to some extent. Their duties also frequently include moving invalids in wheeel chairs when occasion requires and the paging of passengers for telegrams or telephone calls. At many of the stations class B red caps as well as class A red caps are required to assist in cleaning the waiting rooms and rest rooms. They are frequently assigned alternatively to such duties. At some stations they call trains and assist in running elevators. There are some stations at which the red caps deliver telegrams and mail to station officials and do other errands for them. Many of the persons performing red cap duty do so as part-time work in addition to their regular duties as janitors or the like. At three stations the captains in addition to their duties as such are permitted to operate some kind of

concession such as a shoe-shine stand. Persons in each class are usually on duty for a full day of seven or more hours.

The head red caps and captains are on a salary basis at many stations, and in such instances the amount of their salaries depends to some extent, apparently, on their opportunities to obtain tips. Likewise, the amount of the salaries or wages, when such are paid to the general force of red caps, appears to depend on their opportunities to obtain tips. At some stations their wages are merely nominal, amounting to $10 per month or less. At one such station, where the red caps are alternately assigned one day per week to a post not considered desirable from the standpoint of tips, such persons are paid $1 per day for each day so assigned. At another station certain of the red caps are given an allowance of 75 cents per day for meals. At one station their regular compensation is only $1 per year. The persons in both classes are not permitted to solicit tips, except that at a very few stations it is permitted or not prohibited. It should be noted that most of the persons in class A receive tips when voluntarily given. The exceptions are principally head red caps or captains whose duties are mostly of a supervisory nature. The information supplied regarding the amount of the tips received by red caps is somewhat fragmentary but indicates that the tips vary from $1 to $3 or more per day.

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At about one-half of all stations, and especially at the large ones, the red caps in both classes are required to wear a regulation uniform in addition to a regulation cap and badge, although at a few of them the extent of the uniform is limited to a regulation jacket. In most instances the red caps bear the cost of the uniforms. One company bears the cost when over $20 per person, and at a few

stations the company bears one-half of the cost.
179 The badges, coat buttons, and caps are frequently furnished by and at the expense of the company. The dress requirements and the manner of bearing the cost thereof are, with few exceptions, the same for both classes at each station.

Nearly one-half of those in class A are members of a relief, benefit, or hospital association maintained by the respondents. Those in class B are not usually members of such associations, but there are such members at a few stations. About one-third of the red caps in class A are members of some labor organization having agreements regarding working conditions with respondents. Similar agreements have been made for class B red caps at a few stations, notably for 35 red caps at stations of the Illinois Central Railroad Company in Chicago, Ill., and for 59 red caps of the Southern Pacific Company at Los Angeles, California.

Seniority, when the red cap is otherwise qualified, is usually recognized in the choice of posts, in cases of reduction of force, as to day or night work, and in selection for other forms of promotion. Seniority rights are guaranteed by contract at stations where the red caps are members of a labor organization having an agreement with the railway or station company.

Substantially one-half of the persons in class A are conceded by the reporting companies to be employees, and practically all in class A have been considered as eligible to receive passes for free transportation. Some of the reporting companies concede that those in class B are also employees, but there are only about 200 red
180 caps so conceded. On the other hand, approximately 2,000 of the class B red caps have been

considered by the reporting companies as eligible to receive passes for free transportation.

The following statement represents the position of those companies which do not concede that red caps in class A are employees.

The "Class A" persons are employees only to the extent to which they perform services for these companies and for which services they receive compensation from these companies. Such services do not include services performed for passengers or others in and about stations, as to such services for passengers or others, such "Class A" persons occupy the same status as "Class B" red caps who perform services for passengers or other from whom they receive such compensation as those engaging their services determine. As to those services for passengers or others, these companies are neither obligated to nor do they pay such red caps.

In amplification of the above, respondents explained that the salaries received are for duties such as cleaning stations, operating elevators, calling the trains, or other similar duties. The ultimate conclusion in this proceeding does not depend upon whethen the persons in class A are conceded by respondents to be employees.

Examination of answers to petitions and returns to the questionnaire discloses the position of respondents with respect to red caps who receive no compensation other than tips to be that such persons are not performing a common-carrier service; that they are not hired,
181 but are licensees or concessionaires who are permitted to ply their trade for profit on the station premises; and that they are in the same category as other tradesmen, such as newsboys, bootblacks, barbers, soft-drink servers, taxicab drivers, or transfer agents who

may be permitted by contract to use the station premises for their individual pursuits. It is pointed out that, like red caps, all of these persons must be subject to rules, regulations, and disciplinary supervision in the interests of order, good conduct, and system.

In considering respondents' position as outlined above, it should be noted that the provisions of the Railway Labor Act are not limited to employees performing a common-carrier service. Also, the status of the allegedly comparable tradesman has not been considered by the Commission. However, it seems obvious that most, if not all, of such tradesmen are not so closely related to the transportation service of the respondents, and are allowed more independence of action than are the red caps. For example, a passenger employing the services of a barber expects to, and is expected to, pay a certain fixed charge for the services performed, whereas the remuneration of red caps on a tip basis depends upon the generosity of the passenger.

In their exceptions and oral argument respondents urge that paragraph 5 of section of the Railway Labor Act does not confer upon this Commission any jurisdiction
182 to designate any persons as employees or to designate their work as that of employees, especially where, as here, respondents object to such designation. Paragraph 5 clearly provides that this Commission has the authority to define work performed as that of an employee. If the work performed is that of an employee, those performing the work are necessarily employees.

The Director General of Railroads on March 14, 1919, issued a ruling interpreting his general order 27 and supplement 7 thereto as follows: "The service performed by 'Red Caps' is personal service not a part of the duty

of the carrier, therefore neither General Order No. 27 nor Supplement No. 7 thereto apply to them." General Order 27 was issued during the war period, when the railroads were under Federal control, and its primary purpose was to establish equitable wage scales. Apparently the above-quoted ruling was broad enough to apply to red caps who receive a regular wage as well as those whose only compensation is through tips. On June 15, 1921, the United States Railroad Labor Board, created under the authority of the Transportation Act, 1920, issued a decision denying requests for the establishment of increased rates of pay for "parcel porters generally known as 'Red Caps', and foremen thereof engaged in and around Union Station, Washington, D. C." The decision does not show that the increases in pay were denied because the persons involved were not considered to be employees.

183 On April 18, 1921, the Commission approved rules for reporting information on railroad employees together with a classification and index of steam-railroad occupations which had been prepared by the United States Railroad Labor Board. The Commission issued the following statement in connection with those rules:

The accompanying rules governing the Classification of Steam Railway Employees and Reports of Their Service and Compensation provide for more detailed reports to the Commission relative to railway employees than have hitherto been required. The resulting statistics are intended to meet the needs of both the United States Railroad Labor Board and the Interstate Commerce Commission. The classification of employees was worked out by the Labor Board. The information required concerning each class or so-called reporting division is largely in accord with the recommendation of the Director General of Railroads, with some modifications as the result of con-

ferences and hearings held jointly by the Labor Board and the Commission at which representatives of labor organizations and carriers were present.

The above-mentioned rules provided for the reporting of station attendants described therein as follows:

Station Attendant:

The above class includes positions in which the preponderant duties of incumbents are to be in attendance at stations and to render assistance to the public, 184 such as carrying baggage and parcels, procuring taxicabs and other conveyances, maintaining retiring rooms and lavatories in a clean condition, supplying towels, soap, and other toilet supplies; and to perform related work.

Illustrative Examples of Positions and Duties: Station Attendant: * * * Porter, assisting passengers with baggage and parcels, procuring cabs, etc.

It is obvious that the above definition was intended to apply to red caps, at least to those receiving regular salaries or wages, and the definition is sufficiently broad to cover also red caps whose only compensation is through tips. In 1928 the Commission's Bureau of Statistics informally ruled that the compensation of red caps not on a salary basis need not be included in the carriers' annual reports to the Commission. Although the above-mentioned rulings do not definitely disclose that they were intended as rulings that red caps are not employees, it is deemed appropriate to point out that the information obtained from the returns to the questionnaire in this proceeding is undoubtedly more complete and comprehensive than was the information upon which the aforementioned rulings were based.

The Railroad Retirement Act of 1935, as amended June 24, 1937, specifically provides that persons who receive no compensation other than tips are not subject to that act. The reason for that provision may be that annuities authorized by that act are based largely on percentages of em-
ployees' monthly compensation. The Railway
185 Labor Act is not limited to disputes covering wages or salaries, but also has application to disputes covering working conditions generally. Therefore, the provisions thereof can have application to employees who receive no regular compensation from a carrier. From the fact that persons who receive no compensation other than tips are not excepted, as is the case in the Railroad Retirement Act, it may be presumed that Congress did not intend to so restrict the Railway Labor Act. The National Mediation Board, which administers the Railway Labor Act, has considered the status of red caps at passenger stations in Kansas City, Mo., and Washington, D. C., and in its decisions R-107 of March 23, 1935, and R-171 of November 27, 1935, respectively, has found such persons to be employees under paragraph 5 of section 1 of the Railway Labor Act. As the result of submission to that board of the question of the status of red caps on the Southern Pacific lines and that board's decision R-230, of October 9, 1936, certifying the proper employees' union for purposes of representation, the Southern Pacific has entered into an agreement, heretofore referred to, with the employees' organization, covering red caps at stations on its lines.

When consideration is given to the fact that red caps are used at most of the large passenger stations and that at many stations they are paid regular wages, the con-
clusion is inescapable that at large stations where
186 the distances from trains to waiting rooms and streets are substantial, red caps are considered necessary in the interests of a well-managed station. It

seems to be a proper inference that, where the tips from passengers are not sufficiently remunerative, salaries or wages are paid to such persons. The receipt of a stated wage is not essential to create the relation of master and servant or of employee neither expects nor is entitled to any compensation. The test of such relationship is whether the alleged master or employer has the right to hire or discharge the servant or employee or exercise authority with respect to the manner and conduct of the work to be performed.

The services of red caps are usually engaged in much the same manner as are the services of respondents' employees generally, and red caps are under the general and continuing authority of the stationmaster or similar officer of substantially equal rank and their assistants to supervise and direct the manner of rendition of service. They are also subject to rules with respect to dress and manner of conduct and usually to a variety of other rules, for infractions of which they are subject to reprimand and dismissal. Most companies have considered that they were employees in granting them free transportation. The facts with respect to red caps show that they are employees within the generally accepted meaning of that term.

Although these persons may be employees of the various respondents, it is apparently the latter's position
187 that they are not performing any work which may properly be defined as the work of an employee or subordinate official. We do not agree with that contention, but are of the opinion that the work is of such a nature that it should be included in the Commission's orders defining and classifying employees and subordinate officials. Our findings will be limited to such work performed at cities of over 100,000 population as specified in the questionnaire. However, there is no apparent reason why the work performed at smaller cities should be treated any differently.

The brief of one of the labor organizations cites numerous Court decisions in support of the proposition that red caps are carrier employees. One of the most widely cited decisions is Booker v. Pennsylvania R. Co., 82 Pa. Super. Ct. 588, wherein a passenger sued for the value of a suitcase lost through the negligence of a red cap. The carrier defended on the ground that the red cap was not an employee but plaintiff's personal servant. The Court held for the plaintiff, saying at Page 596:

The baggage at the time it was lost was in the custody or possession of the defendant, in the person of its porter, whom it held out to the traveling public as being employed for the purpose of carrying such baggage.

The Court also said at Page 592:

It was proven that red-cap porters are railroad station porters who assist passengers with their hand baggage; they are bonded and wear a uniform on which
188 there is embroidered "Penna. Station Porter" together with the number assigned them, this one being No. 53; they are under the control of the supervisor of the station to whom they report for instructions and by whom they are assigned to their duties. On some days they run the elevator; again they work in the railroad post office by turns; then again they carry hand baggage for passengers. It was testified by the porter that when they are "portering only" they get no pay from the railroad company but look to the passengers. The jury were not bound to accept this statement as true: * * *; but even if believed that did not of itself change the porter's status from an employee of the railroad company to a servant of the passenger. It was not pretended that the railroad company advertised or informed the traveling public that it had engaged a number of trusted men whom it was prepared to furnish to passengers for employment

by them as personal servants to assist in carrying their hand luggage for reasonable compensation. The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which she was not bound to give and which the porter could not have recovered in an action of assumpsit if the passenger had not seeen fit to give it. The fact that a traveler gives a tip to a porter for courteous service in the carriage of his hand luggage does not make the porter his servant for whose negligence he is responsible any more than a tip given to a bell boy in a hotel, to a waiter in a restaurant, or to a hat check em-

ployee, changes the status of their respective em-
189 ployment. Nor does the fact—if such is the case—
that the railroad company does not pay its employees while they are 'portering only' but that their sole source of revenue in such circumstances is the tips which they receive from passengers, negative the continuance of their employment while acting as porters or relieve the employer of responsibility for their acts within the scope of their employment. If a waiter employed by a hotel or restaurant agrees to work without compensation from his employer, relying on the tips which he anticipates he will receive from the customers, he is none the less in the employ of the hotel or restaurant and does not become the servant for the time being of each, and every customer upon whom he may wait, nor could he sue the customer for compensation upon a quantum meruit if no tip was forthcoming. It is well known that hat check employees are frequently not only paid by the hotel or restaurant where they are employed but that in some instances large sums of money are paid for the concession, but this does not make the hat check employee the servant of the patron who may or may not give him a tip. * * *

Nor is it material that the railroad company has not filed tariffs covering the services of these porters. It

does not file tariffs for their services when they act as elevator men, or for their ushers, or the employees in their bureau of information, or for the many other attendants who furnish aid and assistance to travelers using their line, or are employed in connection with the
190 facilities of transportation which a well managed railroad in large centers of population furnishes to the traveling public to expedite its own business as well as for the convenience and accommodation of its patrons.

Another important case is Franklin v. Southern Pac. Co. 203 Cal. 680, 265 Pac. 936, 59 A. L. R. 118, certiorari denied, 278 U. S. 621 (1928). The plaintiff, a passenger, sued the carrier for negligent loss of hand baggage which she had handed to a red cap at the station, with instructions to redeliver to her on board the train. It appeared that the carrier had filed a tariff with this Commission, reading in part as follows:

Rule 10. Where red-cap porter service is provided, hand baggage will be handled without charge by redcap porters to and from trains of Southern Pacific Company. Liability upon hand baggage handled by redcap porters will be limited to $25.00.

Against the carrier's contention that the red cap was not its employee, the Court said, at Page 683:

The contract to transport respondent admittedly imposed upon appellant the duty of transporting the hand baggage or luggage in question. In considering federal decisions care must be used lest confusion result. The first important consideration at the outset is: Were the services of the porter tendered to and accepted by resondent gratuitous? We think that clearly they were not. Plaintiff paid the full price for her transportation with the knowledge, presumptive or actual, that this service

was part of the consideration entering into the
191 purchase. The fact that it might or could be dispensed with did not make it gratuitous. Porter service of all kinds might be withheld, but the answer to this proposition is that good business principles doubtless require it in order to get and retain patronage. This service must be held to have been covered by the fare paid for the transportation. Herbert v. Shanley Co., 242 U. S. 591.

In an earlier case involving the same carrier, Southern Pac. Co. v. Maloney, 136 Fed. 171, Justice Van Devanter, speaking for the Circuit Court of Appeals, held the carrier liable for damages caused by misdirection and by theft of baggage by a porter in the station.

In the most recent reported case involving the red cap's employment status, Cole v. Atlantic Coast Line R. Co., 211 N. C. 591, 191 S. E. 353, annotated in 22 Minn. L. Rev. 741, a red cap working in defendant's station directed plaintiff to the wrong train and failed to advise her that the train was about to start. As plaintiff started to board the train, it started with a jerk and injured her. The defendant's contentions were substantially the same as respondents' contentions here, that the red caps were not employees. The Court said at Page 355:

It can profit the defendant nothing in the present action that the "red cap" was only a volunteer worker and not upon its payroll * * *. With permission of the de-
fendant he was allowed to work upon the
192 premises, for what he might receive in tips, it is true, nevertheless his acts were those of the defendant in the discharge of the contractual duties which it owed to the railroads, using its station, and to their passengers. * * * He was carrying out his customary duties.

See also Benson v. Northland Transp. Co., 274 N. W. 532 (Minn. 1937); Great Western R. Co. v. Bunch, 13 App.

Cas. 31; and Soanes v. London & S. W. R. Co., 120 Law T. Rep. N. S. 598.

We find that the work defined as that of an employee or subordinate official in the orders of the Commission now in effect should be, and it is hereby, amended and interpreted so as to include the work of persons designated by terms such as red caps, station attendants, parcel porters, ushers, chief ushers, and captains, whose duties consist of or include the carrying of passengers' hand baggage and otherwise assisting passengers at passenger stations and other places on carriers' premises and equipment in cities of over 100,000 population, based on the 1930 census, whether such persons receive a stated compensation or are entirely dependent upon tips, and brings such persons within the term "employee" as used in the fifth paragraph of section 1 of the Railway Labor Act, as amended.

An appropriate order will be entered. 229 I.C.C.

193 ORDER.

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 29th day of September, A. D. 1938.

Ex Parte 72 (Sub-No. 1.)

In the Matter of Regulations Concerning the Class of Employees and Subordinate Officials That are to be Included within the Term "Employee" under the Railway Labor Act.

It appearing, That certain employee organizations have filed petitions requesting this Commission to amend or interpret its orders defining and classifying employees and subordinate officials under paragraph 5 of section 1 of the

Railway Labor Act, as amended, so as to include the work of the persons described in the next succeeding paragraph hereof, and full investigation of the matters and things involved having been made, and the division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That the work defined as that of an employee or subordinate official in orders of this Commission now in effect be, and it is hereby, amended and interpreted so as to include the work of persons designated by terms such as "red caps", station attendants, station porters, parcel porters, ushers, chief ushers, and captains, whose duties consist of or include the carrying of passengers' hand baggage and otherwise assisting passengers at passenger stations and other places on carriers' premises and equipment, in cities of over 100,000 population, based on the 1930 census, whether such persons receive a stated compensation or are entirely dependent upon tips, and brings the persons performing such work within the term "employee" as used in the fifth paragraph of section 1 of the Railway Labor Act, as amended.

194

By the Commission, division 3.

W. P. BARTEL,
Secretary.

(Seal)

Mr. Flanagan:

Plaintiff next offers in evidence, if your Honor please, PLAINTIFF'S EXHIBIT "Q", which is a Time Table No. 123, published by the defendant company, this particular time table dated July 23, 1939, and I will not read all of it, but I think your Honor will see the meaning of it. It has a list of all trains coming in and out of stations from and to various points, and shows that many of those trains are

going to points beyond the State of Texas and coming from points beyond the State of Texas.

Said time table Exhibit "Q", showing trains arriving in Dallas from other states and leaving Dallas destined to other states.

Mr. Flanagan:

I think that concludes all of the exhibits, if your Honor please, and I would like to call Mr. Estes.

195 D. W. ESTES, being duly sworn, was examined by Mr. Flanagan, and testified as follows:

Q. Your name is D. W. Estes?
A. Yes, sir.
Q. Where do you live?
A. Dallas, Texas.
Q. Are you employed by The Union Terminal Company, the defendant in this case?
A. Yes, sir.
Q. How long have you been employed?
A. Twenty-two years, going on twenty-three.
Q. What are your duties there?
A. I am gateman down there.
Q. By gateman, you mean what?
A. The inspection of tickets and directing people to trains and giving information and answering telephones.
Q. That is tickets of passengers that go to various trains?
A. Yes, sir.
Q. Are you familiar with the trains that run in and out of the station?
A. Yes, sir.
Q. In the inspection of those tickets for the passenge since the 24th day of October, 1938 up to the present tim

have you noted persons, tickets of persons, that
196 were going to points beyond the State of Texas?

A. Yes, sir.

Q. Can you give a fairly accurate estimate of the percentage of people going through the station as to the number going to points beyond the state of Texas?

A. I would say half of them.

Q. Can you tell the Court to what States they were traveling?

A. Oklahoma, Kansas, Arkansas, Illinois, California, Louisiana and various states.

Q. Have you had occasion to observe the incoming trains that come from out of the State of Texas as they stopped there to unload passengers?

A. Yes, sir, I see them coming in every day.

Q. With respect to baggage and passengers traveling on those interstate trains, will you tell the Court how the baggage of the passengers is unloaded, that is, the baggage that accompanies the passengers?

A. I see from my position where I work up there, and out the window, I see them unloaded. The porters unload the baggage from trains, lifting it off and putting it back out of the way so people can get off.

Q. They lift it from the platform of the train?

A. Yes, sir, and put it on the platform of the station.

Q. Do you know upon whose instructions they do that?

A. No, sir, I cannot say that.

197 Q. You do not know?

A. No, sir.

Mr. Flanagan:

That is all, I think.

(Witness excused.)

198 L. H. AKERS, being duly sworn and examined by Mr. Flanagan, testified as follows:

Q. Give your name, please.
A. Louis Haywood Akers.
Q. Address.
A. Route 1, Lancaster, Texas.
Q. Where are you employed?
A. By the Missouri Kansas & Texas Railway Company of Texas.
Q. Are you the L. H. Akers whose name is signed to the working agreement of the Union Terminal Company with the Red Caps?
A. Yes, sir.
Q. As Assistant General Chairman?
A. Yes, sir, I am.
Q. The agreement referred to was dated January 1, 1940?
A. Yes, sir.
Q. Mr. Akers, as the Assistant General Chairman, did you, together with Mr. Foster and Mr. Hyson, and Mr. Barton and Mr. Estes and Mr. Pickett set in various conferences that took place between the company and this committee in the negotiations of the working agreement with these red caps?
A. Yes, sir, I did.
Q. Were you familiar with the letter of protest dated October 24, 1938 forwarded by Mr. Pickett to the Union Terminal Company protesting against the letter dated October 22, 1938 issued to the Red Caps?

199 A. Yes, sir.
Q. I will ask you whether or not this letter of protest dated October 24, 1938 had ever been recalled or revoked by the committee representing these employees?
A. No, sir, it has not to my knowledge.

Q. Were you familiar with the meeting that took place at various times with Mr. Buckner and the officials of the defendant company from October 11, 1938 up to the time of the signing of this agreement dated January 1, 1940?

A. Well, yes, sir, more or less; I was more or less familiar with it.

Q. At any of those conferences was there ever any agreement on the part of the Red Caps, or on the part of the committee representing these men, to withdraw their demand for minimum wage of schedules as referred to in this Rule 16 of the agreement?

A. There was not.

Q. If any of these men have complaints against the company or grievances of any kind, are you one of the men they come to to handle their grievances.

A. They have most always generally reported those grievances directly to me first. In some instances when Mr. Pickett was in town they would report them to him, but they were usually reported to me.

Q. Have you known of any occasion from October 24, 1938 up to the present time where any of these
200 Red Caps had been discharged by reason of their failure to agree to the proposition set out in the letter dated October 22, 1938?

A. No, sir, I do not, I haven't handled a single case regarding that.

Q. Have you handled some of the cases where some of these Red Caps were discharged?

A. I have handled one of those.

Q. That was who?

A. Johnson.

Q. Was he discharged by reason of his failure to agree to this proposition set forth in this letter?

Mr. Payne:

We object to that as calling for a conclusion from the witness.

Mr. Flanagan:
I withdraw that.

Q. Do you know what he was discharged for?

Mr. Payne:
I object to that question as calling for the same conclusion, this witness has no connection with the defendant company:

The Court:
He asked him if he knows, and if he does not know he can say so, why he was discharged.

Mr. Flanagan:
Q. Did you learn from the company why he was discharged?
A. Yes, sir.
Q. What reason did they give you?

201 The Court:
Let him show who he learned it from, you have got an objection here.

Mr. Flanagan:
Q. Who did you learn that from, Mr. Akers?
A. Pardon me—who did I learn it from that he was discharged?
Q. Yes.
A. I learned it from the employee, they served notice on the employee that they were taking him out of the service for the reason—

The Court: (Interrupting):
I sustain the objection now.

Mr. Flanagan:

Q. Did you have any conference with the company about this employee?

A. Yes, sir, I had a conference.

Q. Now, who did you have a conference with?

A. Mr. Buckner.

The Court:

All right.

Mr. Flanagan:

Q. In that conference with Mr. Buckner, did you learn from Mr. Buckner why this man was discharged?

A. Yes, sir.

Q. What was the reason given by him?

A. For certain language or conduct in connection with —a man there that represents the business for the Missouri, Kansas & Texas Railway Company, in connection with the handling with some baggage from the train, they discharged him for the reason that he talked back to this man some way or another.

The Court:

I think that is far enough on that.

Mr. Flanagan:

That is all.

(Witness excused.)

202 JIM FOSTER, (Col.), being duly sworn and examined by Mr. Flanagan on behalf of the plaintiff, testified as follows:

Q. State your name, please.

A. Jim Foster.

Q. Where do you live?
A. 1114 Dale, Oak Cliff, Dallas.
Q. Where are you employed?
A. The Union Terminal Station.
Q. In Dallas, Texas?
A. Yes, sir.
Q. How long have you been employed by that company?
A. Over 15 years.
Q. In what capacity?
A. Captain of the Red Caps at the present time.
Q. How long have you been Captain of the Red Caps?
A. Since May, 1939.
Q. Now, as a Red Cap, you carry baggage to and from the trains down there, do you?
A. I do.
Q. Do all of the Red Caps involved in this suit do the same thing?
A. Yes, sir.
Q. When trains come in from points beyond the State of Texas, outside of the State of Texas, into Dallas, will you tell the Court who unloads the passengers' hand baggage and personal effects out of that train and onto the platform?
203
A. It is our duty to be at those trains when they come in and get the baggage off as quick as possible of the pullman and chair cars to allow passengers to unload.
Q. By whose instructions are you required to take that baggage from the platform of the train and sit it onto the platform of the station?
A. The Station Master.
Q. Who is the Station Master?
A. Mr. W. C. Young.
Q. Did you receive any pay for that?
A. No, sir.
Q. Now, how many hours a day do you work?
A. Eight.

Q. Do all of these men work the same eight hours a day?

A. They work eight hours, but not the same hours.

Q. In other words, they have different shifts?

A. Yes, sir.

Q. You men carry baggage of passengers from trains out to the street, do you?

A. Yes, sir.

Q. And from the street into the trains?

A. Yes, sir.

Q. Do you have occasion to observe where the people are going when you take their baggage into the
204 trains?

A. Going to the trains—

Q. (Interrupting) The people who go to get on the trains?

A. Yes, sir, quite often.

Q. And this baggage check, that was given to you down there, which is marked Exhibit "E", you are familiar with that form of check?

A. Yes, sir, I am.

Q. I note on the back of that it has the number of the porter the car number and section and train number, are you required to do anything with respect to that?

A. Yes, sir, that is instructions as to what space they have, if they have any or reservation if they are going on a pullman, what car they are going in and the number of berth. That is placed on the check.

Q. Who ordered you to fill that information in on that check?

A. It was a custom when I went there and I was instructed by the captain at the time I started to work as to how those things were done.

Q. Since you have been captain down there you have charge of certain of the boys down there, do you?

A. I do, yes, sir.

Q. Certain of the Red Caps?

A. Yes, sir.

Q. Have you been told by anyone connected with the company as to the reason that the information should be placed on there?

205 A. No, sir, we have been called about it, due to mix-ups of baggage, and one time we were called up and cautioned about so much mix-up of baggage and told there would have to be something done about it or else somebody, the man at fault would lose out, and said possibly it was because not taking enough time to find out where the passenger was going, and to take time and ask and see where the passenger was going and avoid it.

Q. Who with the company give you those instructions?

A. Mr. Buckner called us upstairs in his office.

Q. At that time was there any particular thing that happened?

A. Baggage being mixed up was the cause of it, was the cause for so much trouble with it.

Q. Do you sometimes carry the baggage of persons going to and from these various trains that do not pay you for carrying baggage?

A. Yes, sir, that happens.

Q. These people that fail to give you tips for carrying baggage to and from the train, can you tell the Court about what percentage of them that fail to tip you for that?

A. I do not know, I never kept any account of it. It is not something that happens at every train, but it does happen. There are times, I cannot say what per cent though.

Q. Do you have any people who are sick or old people that you carry baggage for that do not pay you?

A. Yes, sir.

206 Q. How often does that happen in the course of a day or week or month?

A. I could not keep any check and I have not kept any check, and I could not say how often it happens.

Q. Would you tell the Court that it happened frequently?

A. Yes, sir, it is a common thing, maybe. I may have it happen to me a time or two a day and hear someone else speaking about it tomorrow.

Q. Have you had any instructions from any officials of the company with respect to whether or not you have to or do not have to carry that baggage?

A. We have instructions and understanding that we are to wait on them whether we get anything, regardless, and we are supposed to wait on them whether they give us anything or not.

Q. In other words, with respect to these tips, do you charge these people anything, or do you depend upon them giving you whatever they want to?

A. They give us whatever they want to.

Q. Are you allowed to make them any special charge or charge them anything, especially any special price?

A. No, sir, we are not.

Q. Your name, I believe appears on this agreement which is marked Plaintiff's Exhibit "A" and dated January 1, 1940, are you the James Foster whose name appears on this agreement as committeeman?

207 A. I am, sir.

Q. Will you tell the Court with respect to the letter of protest that was filed by Mr. Pickett in behalf of your order of Red Caps on October 24, 1938, did your organization ever withdraw that protest?

A. No, sir.

Mr. Payne:

The question involves a conclusion and I object to it. It would be a conclusion as to whether or not the contents of the letter of October 24th was withdrawn, as to whether or not he actually went up and got it from us, maybe that question could be asked, otherwise, I think it is a conclusion of law.

The Court:

The Court bears in mind the position of each side and I will allow him to testify. It might better to shape the question so he would not be testifying to what somebody else said.

Mr. Flanagan:

I will accept the amendment.

Q. Did your committee or your organization at any time ever serve any written notice upon the defendant company that you were withdrawing the protest filed October 24, 1938, in which the protest was made against the action of the company in their letter dated October 22, 1938?

A. No, sir, not that I know of.

Q. And what position do you hold in your union?

A. I am secretary.

Q. And as secretary, have you ever known of
208 any action on the part of your union in withdrawing this protest?

A. No, sir.

Q. Now with respect to tips that were collected by the Red Caps from October 22, 1938 up to the present time, did you ever turn over any of those tips to the company?

A. No, sir.

Q. Did you ever intend to relinquish those tips as your property?

Mr. Payne:

I object to their intention, the intention of this man; our position being that the letter of October 22nd outlines the terms under which they were allowed to retain tips and any secret intention he might have when he acts under our letter of October 22nd, could not affect the binding force of that letter.

Mr. Flanagan:

We contend they never accepted it, it takes two to make an agreement.

The Court:

The question is you have an intention in his heart there, that is the trouble.

Mr. Flanagan:

Maybe I could put it some other way.

The Court:

All right. When you got the tip, you kept it, is that it?

A. Yes, sir.

Mr. Flanagan:

Q. Did you sit in this conference with Mr. Pickett and Mr. Akers and other committeemen from time to time in the working out of this working agreement that
209 was finally signed on January 1, 1940?

A. I did, yes, sir.

Q. I call your attention in that working agreement to Rule No. 16 in which it says:

"The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act', the carrier is required to pay a wage to the Red Cap over and above any amount that may be received by them as tips."

Were you present when that was discussed from time to time about the Fair Labor Standards Act?

A. I was.

Q. Did you at any time ever tell this company that you were accepting the terms of that letter dated October 22, 1938?

A. No, sir, I did not.

Q. Have you ever been paid since October 22, 1938 the rate of pay of 25 cents an hour by the company?

Mr. Payne:

If the Court please, what he received in the way of compensation is set out in the stipulation, and the stipulation also says that no evidence contrary to what is contained in the stipulation can be offered. The question also involves a conclusion as to whether or not the tips he received are a part of the 25 cents, and for that further reason I think it is not a proper question.

210 The Court:

I understood he asked him whether he has been paid the 25 cents regardless of any tips over and above, have you ever been paid 25 cents by the company?

Mr. Payne:

We stipulated that we have not paid them.

Mr. Flanagan:

Just so we have that understanding.

The Court:

I think I understand it. If they did not receive enough in tips to make 25 cents an hour then the company paid them enough to make up that 25 cents for the first year.

Mr. Flanagan:

Yes, sir, that is right.

The Court:

If they received more than 25 cents, this company did not ask them to pay it back?

Mr. Flanagan:

And the same thing is true with reference to 30 cents.

The Court:

Yes.

Mr. Flanagan:

Q. You stated that people for whom baggage was carried going to these various trains in interstate commerce or going to other states, that you knew they were going to other states, how did you know where these people were going?

A. I know by several ways. I have a chance to—in all cases they tell us to put their bag on some certain train and if they have a pullman generally they call the number and they know where that pullman goes, say maybe to Amarillo or to St. Louis or to Houston, where they are going, and they usually say I am going to Muskogee or whatever place they are going, and for that reason I know where they are going. There are particular cases where they do not have a pullman reservation. Of course where they have a pullman reservation I can tell that from the pullman ticket.

211

Q. Could you tell the Court approximately what percentage of the people that you carry baggage for down there taking these trains that are going beyond the state of Texas?

Mr. Payne:

I object to that question because the witness in his previous answer has shown that whatever information he has comes from some third party, the passenger, and would be hearsay so far as the witness is concerned, and if it comes from the ticket it would also be hearsay.

Mr. Flanagan:

I will strike it and ask this:

Q. Based upon the tickets you have examined, based upon pullman tickets that you have examined, can you tell the Court what percentage of the people going into those pullman cars for whom you carry baggage are destined to points beyond the State of Texas?

Mr. Payne:

I object to that question because it calls for a conclusion and hearsay and the tickets themselves would be the best evidence.

The Court:

I do not think you outrage any rule here by even admitting that a great many people go out of the State, go interstate and come back interstate; I overrule the objection and allow him to testify.

Mr. Flanagan:

Q. What would you say?

A. I would say—I have not—I have no way of knowing exactly, but I would say better than half of them.

212 The Court:

You have in your written stipulation that a large business is interstate and a large part of it is intrastate, I do not remember exactly the phrase, but you have that in there, both sides. I do not like to get in the record some little error that might include the real issue. Mr. Estes testified he looked at the tickets and he said about half of them were going interstate, and the objection is made that this man might look at a ticket and could not testify. No objection was made to that before. I do not know how much the Court can judicially know about this, probably nothing, but I travel in and out of that station a great deal, so many years that I would not like to put it in the record. I think there is no question made on the interstate commerce feature of it.

Mr. Flanagan:

Prior to October 22, 1938, before that date, could you tell the Court about how many years you had been working there as a Red Cap?

The Court:

He says fifteen years altogether.

Mr. Flanagan:

Q. During the period before the 22nd day of October, 1938, tell the Court whether or not during that period the Red Caps might retain the tips the public had given to them?

A. If I understand you, you say before—

Q. (Interrupting) Before October 22, 1938?

A. Yes, sir.

Q. Do you use any wheel chairs down there?

A. Yes, sir, we do.

213 Q. Who do they belong to?

A. The Terminal.

Q. What do you use them for?

A. To carry sick or crippled people, passengers to or from the train.

Q. So far as you know, do you know any one of these Red Caps who have been employed there since October 22, 1938 who have ever been discharged because of their protest against the provisions of that letter dated October 22, 1938 when you were required to report your tips?

A. No, sir.

Q. By the way, Mr. Pickett, has he represented your order of Red Caps ever since October 11, 1938?

A. He has, yes, sir.

Q. And this letter of protest, that was written on October 24, 1938, that was written, was it at the request of the Red Caps?

A. It was, yes, sir.

Q. Has he been handling your grievances together with Mr. Akers and Mr. Estes and your committee ever since?

A. Yes, sir.

Q. I mean grievances of the Red Caps, when I say your grievances?

A. Yes, sir.

Mr. Flanagan:

You may take the witness.

214 Cross Examination.

By Mr. Payne:

Q. You kept on working at the Union Terminal after you got this notice dated October 22, 1938 from the Terminal?

A. Yes, sir.

Q. You are still working there now?

A. Yes, sir.

Q. Kept on carrying baggage?

A. Yes, sir.

Q. Kept on receiving tips?

A. I did.

Q. And you keep the tips?

A. Yes, sir.

Q. And you were paid money over and above the tips in some instances, were you, from the Terminal Company?

A. When the tips did not make up, what the tips lacked making up.

Q. And you cashed those checks?

A. Yes, sir.

(Witness excused.)

Mr. Flanagan:

In order to shorten the hearing it has been agreed that the other Red Caps involved in this case would testify substantially as this witness has testified.

If your Honor please, we call the Court's attention to the Second Amended Complaint, Paragraph 5, and
215 the agreed statement of facts, in that we agreed that those figures as set out in there as to hours and statistical information is correct, as set forth in the amended petition, our second amended petition.

Mr. Payne:

I think that is substantially correct.

Mr. Flanagan:

We also have, if your Honor Please, a tabulation, we have made a tabulation rather, and counsel for the defense has a copy which they corrected, which shows the hours worked and the amount received in the form of wages and taxes for each employee, set out under the name of each employee, and by the month, and we want to submit that to your Honor as an exhibit. It compares with this second amended petition in that the totals in the second amended petition are the same as they would be in detailed account. The reason we submit it that way is because there are three periods involved in this case that your Honor may want to examine it.

The Court:

What do you mean by tax?

Mr. Flanagan:

That there were certain amounts set out in the second column in the petition which I think is the social security tax, perhaps counsel for the defendant could give us that information. It was a railroad retirement tax, I understand.

The Court:
That cuts no figure in this case.

Mr. Flanagan:
Except this, if your Honor decides the case in favor of the employees they are entitled to that credit that they paid those taxes in behalf of the employees. For Instance,
Mr. Foster, shows the total amount of wages
216 earned is a certain amount figured on 25 cents an hour, in the first year, and in the second column shows $39.60, and that represents the tax paid in his behalf and also represents this difference between the 25 cents an hour, total of 25 cents an hour and the amount of tips that he collected.

The Court:
He had to pay his taxes, they should come out anyhow?

Mr. Flanagan:
Yes, sir, they are entitled to that credit, and we show a balance due.

The Court:
All right.

Foster, James.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	16.40
Nov.	224	.25	56.00	.....	.....	.....	56.00
Dec.	232	.25	58.00	.....	.....	.....	58.00
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	200	.25	50.00	.....	.....	.....	50.00
Mar.	232	.25	58.00	.....	.....	.....	58.00
Apr.	232	.25	58.00	.....	.....	.....	58.00
May	244	.25	61.00	.....	.....	.....	61.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	246¼	.25	61.56	.....	.....	.....	61.56
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	32	.30	9.60	.....	1.17	1.17	8.43
Nov.	238	.30	71.40	7.52	3.95	11.47	59.93
Dec.	248	.30	74.40	9.10	2.05	11.15	63.25

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	232	.30	69.60	9.64	2.09	11.73	57.87
Feb.	230	.30	69.00	9.33	2.07	11.40	57.60
Mar. 1-6	46	.30	13.80	.....	.....	2.14	11.06
Less 12-39 adj...	2		.60				
	44		13.20				
	3,842¼		1,011.76	$35.59	$11.33	49.06	962.70

Johnson, Isaac.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	231½	.25	57.88	.50	.01	.51	57.37
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00

Feb.	216	.25	54.00	.96	.03	.99	53.01
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	224	.25	56.00	.....	.....	.....	56.00
May	232	.25	58.00	.....	.....	.....	58.00
June	224	.25	56.00	.....	.....	.....	56.00
July	224	.25	56.00	.....	.....	.....	56.00
Aug.	232	.25	58.00	.....	.....	.....	58.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.70	1.74	2.44	16.76
Nov.	216	.30	64.80	5.73	1,78	7.51	57.29
Dec.	240	.30	72.00	6.54	1.98	8.52	63.48
1940.							
Jan.	240	.30	72.00	8.43	2.16	10.59	61.40
Feb.	232	.30	69.60	9.81	2.09	11.90	57.70
Mar. 1-6	48	.30	14.40	.....	.....	3.23	11.17
	3,823½		1,007.88	32.67	9.79	45.69	962.19

Franks, J. C.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	241-2/3	.25	60.42	.....	.....	.....	60.42
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	241½	.25	60.38	$ .02	$ .82	$ .84	59.54
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	1.24	1.24	17.96
Nov.	242-2/3	.30	72.80	5.09	5.17	10.26	62.54
Dec.	248	.30	74.40	5.76	2.05	7.81	66.59

1940.							
Jan.	250¼	.30	75.07	7.03	2.25	9.28	65.79
Feb.	232	.30	69.60	6.75	2.09	8.84	60.76
Mar. 1-6	48	.30	14.40	.....	.....	1.98	12.42
	3,984-1/12		1,050.27	$24.65	$13.62	$40.25	$1,010.02

Brigham, J. W.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	240	.30	72.00	$2.33	$6.78	$9.11	62.89
Dec.	248	.30	74.40	4.01	2.05	6.06	68.34
1940.							
Jan.	248	.30	74.40	9.01	2.23	11.24	63.16
Feb.	232	.30	69.60	3.70	2.09	5.79	63.81
Mar. 1-6	48	.30	14.40	.....	.....	1.63	12.77
	3,960		1,044.00	$19.05	$13.15	33.83	1,010.17

Johnson, A. R.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	227	.25	56.75	.....	.....	.....	56.75

1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	200	.25	50.00	.....	.....	.....	50.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	$1.66	$1.74	$3.40	15.80
Nov.	232	.30	69.60	9.64	1.91	11.55	58.05
Dec.	240	.30	72.00	6.92	1.98	8.90	63.10
1940.							
Jan.	240	.30	72.00	8.31	2.16	10.47	61.53
Feb.	220	.30	66.00	9.16	1.98	11.14	54.86
Mar. 1-6	48	.30	14.40	.....	.....	2.32	12.08
	3,879		1,021.95	35.69	9.77	47.78	974.17

Jefferson, John.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00				$16.00
Nov.	240	.25	60.00				60.00
Dec.	248	.25	62.00				62.00
1939.							
Jan.	248	.25	62.00				62.00
Feb.	224	.25	56.00				56.00
Mar.	248	.25	62.00				62.00
Apr.	208	.25	52.00				52.00
May	240	.25	60.00				60.00
June	240	.25	60.00				60.00
July	248	.25	62.00				62.00
Aug.	248	.25	62.00				62.00
Sept.	240	.25	60.00				60.00
Oct. 1-23	184	.25	46.00				46.00
Oct. 24-31	64	.30	19.20		$2.80	$2.80	16.40
Nov.	240	.30	72.00	$4.41	4.94	9.35	62.65
Dec.	248	.30	74.40	7.27	2.05	9.32	65.08

1940.							
Jan.	248	.30	74.40	8.50	2.23	10.73	63.67
Feb.	232	.30	69.60	8.44	2.09	10.53	59.07
Mar. 1-6	48	.30	14.40	.....	.....	3.04	11.36
	3,960		1,044.00	$28.62	$14.11	$45.77	998.23

Alexander, O. A.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	61	.30	19.20	.....	$4.77	$4.77	14.43
Nov.	242-2/3	.30	72.80	$14.46	5.32	19.78	53.02
Dec.	240	.30	72.00	8.30	1.98	10.28	61.72
1940.							
Jan.	184	.30	55.20	7.19	1.66	8.85	40.35
Feb.	232½	.30	69.75	4.84	2.09	6.93	62.82
Mar. 1-6	40	.30	12.00	.....	.....	1.39	10.61
	3,915-1/6		1,028.95	3479	15.82	52.00	976.95

Jackson, Joe.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	$ .68	$ .02	$ .70	55.30
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	240	.25	60.00	.....	.....	.....	60.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	1.74	1.74	17.46
Nov.	244-1/6	.30	73.25	11.29	5.50	16.79	56.46
Dec.	200	.30	60.00	5.85	1.65	7.50	52.50
1940.							
Jan.	248	.30	74.40	10.29	2.23	12.52	61.88
Feb.	232	.30	69.60	9.18	2.09	11.27	58.33
Mar. 1-6	48	.30	14.40	.....	.....	2.00	12.40
	3,948-1/6		1,038.85	27.29	13.23	52.52	986.33

McIntosh, Nathan.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	$ .68	$ .02	$ .70	$13.30
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	2.27	2.27	14.53
Nov.	240	.30	72.00	5.75	6.92	12.67	59.33
Dec.	248	.30	74.40	8.33	2.05	10.38	64.02

1940.							
Jan.	184	.30	55.20	9.48	1.66	11.14	44.06
Feb.	136	.30	40.80	8.10	1.22	9.32	31.48
Mar. 1-6	48	.30	14.40	.....	.....	3.03	11.37
	3,824		1,001.60	$32.34	$14.14	$49.51	$952.09

Turner, Nelson.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	$ .07	.....	.07	$15.93
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	240	.25	60.00	.....	.....	.....	60.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$4.80	$4.80	14.40
Nov.	232	.30	69.60	10.43	5.30	15.73	53.87
Dec.	232	.30	69.60	6.19	1.91	8.10	61.50
1940.							
Jan.	232	.30	69.60	11.50	2.09	13.59	56.01
Feb.	220	.30	66.00	8.60	1.98	10.58	55.42
Mar. 1-6	40	.30	12.00	.....	.....	2.65	9.35
	3,916		1,030.00	36.79	16.08	55.52	974.48

Brooks, Lem.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	232	.25	58.00	.....	.....	.....	58.00

1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	208	.25	52.00	$ .04	.....	$ .04	51.96
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	240	.25	60.00	.....	.....	.....	60.00
June	240	.25	60.00	.....	.....	.....	60.00
July	216	.25	54.00	.....	.....	.....	54.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$2.83	2.83	16.37
Nov.	224	.30	67.20	6.83	4.99	11.82	55.38
Dec.	248	.30	74.40	8.71	2.03	10.76	63.64
1940.							
Jan.	224	.30	67.20	9.72	2.02	11.74	55.46
Feb.	232	.30	69.60	8.20	2.09	10.29	59.31
Mar. 1-6	48	.30	14.40	.....	.....	2.15	12.25
	3,872		1,020.00	33.50	13.98	49.63	970.37

Thomas, Allen.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00				$14.00
Nov.	240	.25	60.00				60.00
Dec.	248	.25	62.00				62.00
1939.							
Jan.	232	.25	58.00				58.00
Feb.	168	.25	42.00				42.00
Mar.	248	.25	62.00				62.00
Apr.	232	.25	58.00				58.00
May	228	.25	57.00				57.00
June	224	.25	56.00				56.00
July	240	.25	60.00				60.00
Aug.	248	.25	62.00				62.00
Sept.	240	.25	60.00				60.00
Oct. 1-23	180	.25	45.00				45.00
Oct. 24-31	64	.30	19.20				19.20
Nov.	240	.30	72.00		$5.80	$5.80	66.20
Dec.	232	.30	69.60	$10.71	3.54	14.25	55.35

1940.							
Jan.	232	.30	69.60	9.49	2.09	11.58	58.02
Feb.	216	.30	64.80	8.51	1.94	10.45	54.35
Mar. 1-6	40	.30	12.00	.....	.....	2.20	9.80
	3808		1,003.20	28.71	13.37	44.28	958.92

Williams, Richard.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	182	.25	45.50	.....	.....	.....	45.50
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	240	.30	72.00	.....	$5.93	$5.93	66.07
Dec.	248	.30	74.40	$6.82	2.10	8.92	65.48
1940.							
Jan.	240	.30	72.00	4.56	2.16	6.72	65.28
Feb.	232	.30	69.60	5.39	2.09	7.48	62.12
Mar. 1-6	48	.30	14.40	.....	.....	1.85	12.55
	3,982		1,049.10	$16.77	$12.28	$30.90	1,018.20

Hollingsworth, Ulyssus.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	144	.25	36.00	.....	.....	.....	36.00
Dec.	176	.25	44.00	.....	.....	.....	44.00

1939.							
Jan.	240	.25	60.00	....	....	....	60.00
Feb.	176	.25	44.00	....	....	....	44.00
Mar.	240	.25	60.00	....	....	....	60.00
Apr.	233½	.25	58.38	....	....	....	58.38
May	248	.25	62.00	....	....	....	62.00
June	240	.25	60.00	....	....	....	60.00
July	256	.25	64.00	....	....	....	64.00
Aug.	244	.25	61.00	....	....	....	61.00
Sept.	232	.25	58.00	....	....	....	58.00
Oct. 1-23	176	.25	44.00	....	....	....	44.00
Oct. 24-31	64	.30	19.20	....	.02	.02	19.18
Nov.	232	.30	69.60	$ 9.07	$7.28	$16.35	53.25
Dec.	248	.30	74.40	12.69	2.05	14.74	59.66
1940.							
Jan.	232	.30	69.60	12.31	2.09	14.40	55.20
Feb.	216	.30	64.80	9.01	1.94	10.95	53.85
Mar. 1-6	48	.30	14.40	....	....	2.95	11.45
	3,701½		977.38	$43.08	$13.38	$59.41	917.97

Turpin, J. T.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	24	.25	$6.00				$6.00
Nov.	24	.25	6.00				6.00
Dec.	96	.25	24.00				24.00
1939.							
Jan.	104	.25	26.00				26.00
Feb.	120	.25	30.00				30.00
Mar.	248	.25	62.00				62.00
Apr.	228	.25	57.00				57.00
May	244	.25	61.00				61.00
June	240	.25	60.00				60.00
July	248	.25	62.00				62.00
Aug.	248	.25	62.00				62.00
Sept.	240	.25	60.00				60.00
Oct. 1-23	176	.25	44.00				44.00
Oct. 24-31	64	.30	19.20				19.20
Nov.	240	.30	72.00	$6.13	$5.72	$11.85	60.15
Dec.	224	.30	67.20	5.16	1.64	6.80	60.40

1940.							
Jan.	240	.30	72.00	5.73	2.32	8.10	63.90
Feb.	224	.30	67.20	8.23	2.02	10.25	56.95
Mar. 1-6	48	.30	14.40	.....	.....	2.50	11.90
	3,280		$872.00	$25.25	$11.75	$39.50	832.50

Campbell, Dave.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	24	$ .25	$6.00	.....	.....	.....	$ 6.00
Nov.	236	.25	59.00	.....	.....	.....	59.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	216	.25	54.00	.....	.....	.....	54.00
Feb.	176	.25	44.00	.....	.....	.....	44.00
Mar.	212	.25	53.00	.....	.....	.....	53.00
Apr.	224	.25	56.00	.....	.....	.....	56.00
May	228	.25	57.00	.....	.....	.....	57.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	152	.25	38.00	.....	.....	.....	38.00
Aug.	216	.25	54.00	.....	.....	.....	54.00
Sept.	224	.25	56.00	.....	.....	.....	56.00
Oct. 1-23	168	.25	42.00	.....	.....	.....	42.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	214	.30	64.20	$1.95	$4.97	$6.92	57.28
Dec.	214	.30	64.20	9.78	1.77	11.55	52.65
1940.							
Jan.	176	.30	52.80	9.10	1.58	10.68	42.12
Feb.	184	.30	55.20	8.27	1.66	9.93	45.27
Mar. 1-6	32	.30	9.60	.....	.....	1.10	7.90
Less 12-39 adj.	2		.60				
	30		9.00				
	3,438		903.60	29.10	9.98	40.18	863.42

Fields, Nelson.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	44	$ .25	$11.00	.....	.....	.....	$11.00
Nov.	64	.25	16.00	.....	.....	.....	16.00
Dec.	176	.25	44.00	.....	.....	.....	44.00
1939.							
Jan.	200	.25	50.00	.....	.....	.....	50.00
Feb.	184	.25	46.00	.....	.....	.....	46.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	.45	.45	16.35
Nov.	240	.30	72.00	$5.98	$6.18	$12.16	59.84
Dec.	248	.30	74.40	9.07	2.05	11.12	63.28

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Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	248	.30	74.40	10.77	2.23	13.00	61.40
Feb.	232	.30	69.60	8.47	2.09	10.56	59.04
Mar. 1-6	48	.30	14.40	.....	.....	2.60	11.80
	3.628		$960.60	$34.29	$13.00	$49.89	$910.71

Robertson, C. H.

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Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	40	$ .25	$10.00	.....	.....	.....	$10.00
Nov.	200	.25	50.00	.....	.....	.....	50.00
Dec.	206	.25	51.50	.....	.....	.....	51.50
1939.							
Jan.	248	.25	62.00	$ .63	$ .02	$ .65	61.35
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	176	.25	44.00	.....	.....	.....	44.00
Apr.	241½	.25	60.38	.....	.....	.....	60.38

May	216	.25	54.00	.....	.....	.....	54.00
June	212	.25	53.00	.....	.....	.....	53.00
July	96	.25	24.00	.....	.....	.....	24.00
Aug.	80	.25	20.00	.....	.....	.....	20.00
Sept.	136	.25	34.00	.....	.....	.....	34.00
Oct. 1-23	160	.25	40.00	.....	.....	.....	40.00
Oct. 24-31	64	.30	19.20	.....	.26	.26	18.94
Nov.	238	.30	71.40	11.22	7.50	18.72	52.68
Dec.	136	.30	40.80	7.70	1.12	8.82	31.98
1940.							
Jan.	160	.30	48.00	7.69	1.44	9.13	38.87
Feb.	120	.30	36.00	5.10	1.08	6.18	29.82
Mar 1-6	40	.30	12.00	.....	.....	2.39	9.61
	2,985½		784.28	32.34	11.42	46.15	738.13

Hunt, Haywood.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	246½	.25	61.63	.....	.....	.....	61.63

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	241½	.25	60.38	.....	.....	.....	60.38
May	208	.25	52.00	.....	.....	.....	52.00
June	232	.25	58.00	.....	.....	.....	58.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$1.57	$1.57	17.63
Nov.	240	.30	72.00	$ 3.94	7.64	11.58	60.42
Dec.	248	.30	74.40	12.84	2.05	14.89	59.51
1940.							
Jan.	248	.30	74.40	13.50	2.23	15.73	58.67
Feb.	232	.30	69.60	11.98	2.09	14.07	55.53
Mar. 1-6	48	.30	14.40	.....	.....	2.60	11.80
	3,952		1,042.01	$42.26	$15.58	$60.44	$981.57

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Spears, Donald.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	216	.25	54.00	.....	.....	.....	54.00
Dec.	249-2/3	.25	62.42	.....	.....	.....	62.42
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	240	.30	72.00	.....	$7.40	$7.40	64.60
Dec.	248	.30	74.40	$8.06	3.52	11.58	62.82

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	248	.30	74.40	11.29	2.23	13.52	60.88
Feb.	224	.30	67.20	8.52	2.02	10.54	56.66
Mar. 1-6	48	.30	14.40	.....	.....	2.04	12.36
	3,945-2/3		1,040.02	$27.87	$15.17	$45.08	$994.94

Hynson, Clinton.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	184	.25	46.00	.....	.....	.....	46.00
Mar.	152	.25	38.00	.....	.....	.....	38.00
Apr.	224	.25	56.00	.....	.....	.....	56.00

May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	232	.25	58.00	.....	.....	.....	58.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	$ .91	$ .91	$1.82	17.38
Nov.	224	.30	67.20	3.70	1.85	5.55	61.65
Dec.	248	.30	74.40	2.83	.99	3.82	70.58
1940.							
Jan.	248	.30	74.40	4.36	3.29	7.65	66.75
Feb.	228	.30	68.40	6.23	2.05	8.28	60.12
Mar. 1-6	48	.30	14.40	.....	.....	2.20	12.20
	3,788		1,000.00	$18.03	$9.09	$29.32	$970.68

Curry, J. P.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	192	.25	48.00	.....	.....	.....	48.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	$3.04	$3.04	13.76
Nov.	240	.30	72.00	$6.67	5.16	11.83	60.17
Dec.	240	.30	72.00	8.05	1.98	10.03	61.97
1940.							
Jan.	248	.30	74.40	5.77	2.23	8.00	66.40
Feb.	232	.30	69.60	10.44	2.09	12.53	57.07
Mar. 1-6	48	.30	14.40	.....	.....	3.25	11.15
	3,920		1,033.20	$30.93	$14.50	$48.68	$984.52

Langston, Charlie.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	232	.25	58.00	$ .83	$ .02	$ .85	57.15
1939.							
Jan.	232	.25	58.00	3.69	.10	3.79	54.21
Feb.	216	.25	54.00	6.38	.18	6.56	47.44
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	240	.25	60.00	.....	.....	.....	60.00
June	224	.25	56.00	.....	.....	.....	56.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	168	.25	42.00	.....	.....	.....	42.00
Sept.	168	.25	42.00	.....	.....	.....	42.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	1.49	5.69	7.18	12.02
Nov.	241	.30	72.30	17.53	1.99	19.52	52.78
Dec.	248	.30	74.40	11.97	2.05	14.02	60.38

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	240	.30	72.00	12.05	2.16	14.21	57.79
Feb.	224	.30	67.20	11.78	2.02	13.80	53.40
Mar. 1-6	48	.30	14.40	.....	.....	3.85	10.55
	3,761		993.50	65.72	14.21	83.78	909.72

Muckelroy, Charles.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	$8.99	$ .25	$9.24	50.76
Dec.	248	.25	62.00	6.13	.17	6.30	55.70
1939.							
Jan.	248	.25	62.00	6.40	.18	6.58	55.42
Feb.	224	.25	56.00	5.72	.16	5.88	50.12
Mar.	248	.25	62.00	6.69	1.71	8.40	53.60
Apr.	240	.25	60.00	8.15	1.65	9.80	50.20

May	248	.25	62.00	3.82	1.71	5.53	56.47
June	240	.25	60.00	10.39	1.65	12.04	47.96
July	248	.25	62.00	7.60	1.71	9.31	52.69
Aug.	240	.25	60.00	8.71	1.65	10.36	49.64
Sept.	240	.25	60.00	5.35	1.65	7.00	53.00
Oct. 1-23	152	.25	38.00	.....	.....	.....	38.00
Oct. 24-31	32	.30	9.60	4.36	1.31	5.67	3.93
Nov.	240	.30	72.00	2.36	1.98	4.34	67.66
Dec.	248	.30	74.40	4.97	2.05	7.02	67.38
1940.							
Jan.	248	.30	74.40	4.02	2.23	6.25	68.15
Feb.	232	.30	69.60	5.91	2.09	8.00	61.60
Mar. 1-6	48	.30	14.40	.....	.....	2.56	11.84
	3,928		1,034.40	$99.57	$22.15	$124.28	$910.12

Jackson, Felix.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	$ .68	$ .02	$ .70	55.30
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	232	.25	58.00	.....	.....	.....	58.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	3.52	3.52	15.68
Nov.	240	.30	72.00	12.20	3.95	16.15	55.85
Dec.	248	.30	74.40	10.12	2.05	12.17	62.23
1940.							
Jan.	248	.30	74.40	10.03	2.23	12.26	62.14
Feb.	232	.30	69.60	9.18	2.09	11.27	58.33
Mar. 1-6	48	.30	14.40	.....	.....	2.56	11.84
	3,984		1,050.00	42.21	$13.86	$58.63	$991.37

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Brigham, Paul.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	224	.25	56.00	.....	.....	.....	56.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	200	.25	50.00	.....	.....	.....	50.00
Mar.	232	.25	58.00	.....	.....	.....	58.00
Apr.	233½	.25	58.38	.....	.....	.....	58.38
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	216	.25	54.00	.....	.....	.....	54.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.82	.82	18.38
Nov.	240	.30	72.00	$2.01	$5.97	$7.98	64.02
Dec.	248	.30	74.40	6.42	2.05	8.47	65.93

Month 1940.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	248	.30	74.40	7.06	2.23	9.29	65.11
Feb.	136	.30	40.80	4.18	1.22	5.40	35.40
Mar 1-6	48	.30	14.40	.....	.....	2.65	11.75
	3,785½		995.58	$19.67	$12.29	$34.61	960.97

May, Arthur.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	$ .25	$ .01	$ .26	$15.74
Nov.	232	.25	58.00	.80	.02	.82	57.18
Dec.	225-2/3	.25	56.42	.63	.02	.65	55.77
1939.							
Jan.	248	.25	62.00	.29	.01	.30	61.70
Feb.	224	.25	56.00	1.07	.03	1.10	54.90
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00

July	248	.25	62.00	.....	.....	.....	62.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	5.97	5.97	13.23
Nov.	241½	.30	72.45	16.04	3.61	19.65	52.80
Dec.	216	.30	64.80	11.04	1.78	12.82	51.98
1940.							
Jan.	248	.30	74.40	12.02	2.23	14.25	60.15
Feb.	232½	.30	69.75	9.20	2.09	11.29	58.46
Mar. 1-6	48	.30	14.40	.....	.....	3.31	11.09
	3,915-2/3		1,031.42	51.34	15.77	70.42	961.00

Jones, Theodore.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	32	$ .25	$8.00	.....	.....	.....	$8.00
Nov.	8	.25	2.00	.....	.....	.....	2.00
Dec.	104	.25	26.00	.....	.....	.....	26.00
1939.							
Jan.	72	.25	18.00	.....	.....	.....	18.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Feb.	120	.25	30.00	.....	.....	.....	30.00
Mar.	160	.25	40.00	.....	.....	.....	40.00
April	216	.25	54.00	.....	.....	.....	54.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	176	.25	44.00	.....	.....	.....	44.00
Oct. 1-23	80	.25	20.00	.....	.....	.....	20.00
Oct. 24-31	40	.30	12.00	.....	.....	.....	12.00
Nov.	80	.30	24.00	$3.12	$1.43	$4.55	19.45
Dec.	184	.30	55.20	4.01	1.52	5.53	49.67
1940.							
Jan.	192	.30	57.60	6.34	1.73	8.07	49.53
Feb.	200	.30	60.00	5.02	1.80	6.82	53.18
Mar. 1-6	40	.30	12.00	.....	.....	1.53	9.87
Less 12/39 adj.	2		.60				
	38		11.40				
	2,670		704.20	$18.49	$6.48	$26.50	677.70

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Cameron, Tilson.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	200	.25	50.00	.....	.....	.....	50.00
Apr.	208	.25	52.00	.....	$ .28	$ .28	51.72
May	...	...	.....	.....	.....	.....	.....
June	...	...	.....	.....	.....	.....	.....
July	160	.25	40.00	.....	.....	.....	40.00
Aug.	216	.25	54.00	.....	.....	.....	54.00
Sept.	208	.25	52.00	.....	.....	.....	52.00
Oct. 1-23	160	.25	40.00	.....	.....	.....	40.00
Oct. 24-31	56	.30	16.80	.....	1.40	1.40	15.40
Nov.	208	.30	62.40	$3.38	6.60	9.98	52.42
Dec.	203	.30	60.90	6.33	1.67	8.00	52.90

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	216	.30	64.80	9.24	1.94	11.18	53.62
Feb.	200	.30	60.00	7.91	1.80	9.71	50.29
Mar. 1-6	40	.30	12.00	.....	.....	2.45	9.55
	3,083		816.90	26.86	13.69	43.00	773.90

McMurray, William.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	.25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	168	.25	42.00	.....	.....	.....	42.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	240	.25	60.00	.....	.....	.....	60.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00

June		224	.25		56.00				56.00
July		184	.25		46.00				46.00
Aug.		248	.25		62.00				62.00
Sept.		240	.25		60.00				60.00
Oct. 1-23		184	.25		46.00				46.00
Oct. 24-31		64	.30		19.20		$3.50	$3.50	15.70
Nov.		240	.30		72.00	$9.12	7.97	17.09	54.91
Dec.		248	.30		74.40	13.37	2.05	15.42	58.98
1940.									
Jan.		232	.30		69.60	10.91	2.09	13.00	56.60
Feb.		232	.30		69.60	10.81	2.09	12.90	56.70
Mar. 1/6	48			14.40					
Less 12/39 adj.	2	46	.30	.60	13.80			2.40	11.40
		3,814			1,006.60	44.21	17.70	64.31	942.29

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Williams, Sam H.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct.	24	$ .25	$6.00				$6.00
Nov.	24	.25	6.00				6.00
Dec.	72	.25	18.00				18.00

Month 1939.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	48	.25	12.00	.....	.....	.....	12.00
Feb.	16	.25	4.00	.....	.....	.....	4.00
Mar.	16	.25	4.00	.....	.....	.....	4.00
Apr.	24	.25	6.00	.....	.....	.....	6.00
May	64	.25	16.00	.....	.....	.....	16.00
June	32	.25	8.00	.....	.....	.....	8.00
July	56	.25	14.00	.....	.....	.....	14.00
Aug.	56	.25	14.00	.....	.....	.....	14.00
Sept.	32	.25	8.00	.....	.....	.....	8.00
Oct. 1-23	8	.25	2.00	.....	.....	.....	2.00
Oct. 24-31	8	.30	2.40	.....	.....	.....	2.40
Nov.	8	.30	2.40	....	$1.10	$1.10	1.30
Dec.	40	.30	12.00	$1.87	1.03	2.90	9.10
1940.							
Jan.	26-2/3	.30	8.00	2.37	.24	2.61	5.39
Feb.	56½	.30	16.95	2.54	.51	3.05	13.90
Mar. 1-6	8	.30	2.40	.....	.....	.55	1.85
	619-1/6		$162.15	$6.78	$2.88	$10.21	$151.94

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Amos, Earnest.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	232	.25	58.00	$ 9.94	$ .28	$10.22	47.78
Dec.	240	.25	60.00	14.57	.41	14.98	45.02
1939.							
Jan.	240	.25	60.00	12.32	.35	12.67	47.33
Feb.	216	.25	54.00	8.65	.24	8.89	45.11
Mar.	248	.25	62.00	13.55	1.71	15.26	46.74
Apr.	224	.25	56.00	10.36	1.54	11.90	44.10
May	244	.25	61.00	10.08	1.68	11.76	49.24
June	240	.25	60.00	10.88	1.65	12.53	47.47
July	240	.25	60.00	13.82	1.65	15.47	44.53
Aug.	248	.25	62.00	18.03	1.71	19.74	42.26
Sept.	240	.25	60.00	20.33	1.65	21.98	38.02
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	15.66	2.89	18.55	.65
Nov.	240	.30	72.00	13.84	1.98	15.82	56.18
Dec.	246	.30	73.80	13.16	2.03	15.19	58.61

Month 1940.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	248	.30	74.40	12.53	2.23	14.76	59.60
Feb.	224	.30	67.20	11.73	2.02	13.75	53.45
Mar 1-6	48		14.40				
Less 12/39 adj.	5	43	30 1.50	12.90	.....	.....	3.00	9.81
	3,925		1,034.50	$209.45	$24.02	$236.56	$797.94

Harton, Harry.

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Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	240	.25	60.00	.....	.....	.....	60.00
1939.							
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	168	.25	42.00	.....	.....	.....	42.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00

May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	246½	.25	61.63	.....	.....	.....	61.63
Aug.	200	.25	50.00	.....	.....	.....	50.00
Sept.	136	.25	34.00	.....	.....	.....	34.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$1.34	$1.34	17.86
Nov.	240	.30	72.00	$4.22	7.46	11.68	60.32
Dec.	248	.30	74.40	5.27	1.51	6.78	67.62
1940.							
Jan.	248	.30	74.40	7.92	2.77	10.69	63.71
Feb.	232	.30	69.60	7.31	2.09	9.40	60.20
Mar. 1-6	48	.30	14.40	.....	.....	1.86	12.54
	3,774½		997.63	$24.72	$15.17	$41.75	$955.88

Wells, Adolphus.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	16	$ .25	$4.00	.....	.....	.....	$ 4.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	180	.25	45.00	.....	.....	.....	45.00

Month 1939.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	240	.25	60.00	.....	.....	.....	60.00
Feb.	136	.25	34.00	.....	.....	.....	34.00
Mar.	...	...	.....	.....	.....	.....	.....
Apr.	56	.25	14.00	.....	.....	.....	14.00
May	248	.25	62.00	.....	.....	.....	62.00
June	240	.25	60.00	.....	.....	.....	60.00
July	224	.25	56.00	.....	.....	.....	56.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	144	.25	36.00	.....	.....	.....	36.00
Oct. 24-31	64	.30	19.20	$ .62	$5.03	$ 5.65	13.55
Nov.	240	.30	72.00	12.29	1.98	14.27	57.73
Dec.	224	.30	67.20	8.68	1.85	10.53	56.67
1940.							
Jan.	248	.30	74.40	11.07	2.23	13.30	61.10
Feb.	232	.30	69.60	10.28	2.09	12.37	57.23
Mar. 1-6	48	.30	14.40	.....	....	2.24	12.16
	3,260		$867.80	$42.94	$13.18	58.36	809.44

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Connor Alphonso.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	40	.25	$10.00	.....	.....	.....	$10.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	232	.25	58.00	.....	.....	.....	58.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	216	.25	54.00	.....	.....	.....	54.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	232	.25	58.00	.....	.....	.....	58.00
June	240	.25	60.00	.....	.....	.....	60.00
July	228	.25	57.00	.....	.....	.....	57.00
Aug.	88	.25	22.00	.....	.....	.....	22.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	56	.30	16.80	.....	$1.39	$1.39	15.41
Nov.	240	.30	72.00	$ 6.52	7.22	13.74	58.26
Dec.	248	.30	74.40	11.75	2.05	13.80	60.60

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1940.							
Jan.	240	.30	72.00	7.29	2.16	9.45	62.55
Feb.	224	.30	67.20	7.53	2.02	9.55	57.65
Mar. 1-6	48	.30	14.40	.....	.....	2.10	12.30
	3,732		985.80	33.09	14.84	50.03	935.77

McNeil, Lawrence.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	208	.25	52.00	$3.68	$ .10	$3.78	48.22
1939.							
Jan.	248	.25	62.00	5.58	.16	5.74	56.26
Feb.	200	.25	50.00	3.88	.11	3.99	46.01
Mar.	240	.25	60.00	1.50	1.65	3.15	56.85
Apr.	228	.25	57.00	2.56	1.57	4.13	52.87

May	240	.25	60.00	2.27	1.65	3.92	56.08
June	240	.25	60.00	7.45	1.65	9.10	50.90
July	248	.25	62.00	6.34	1.71	8.05	53.95
Aug.	248	.25	62.00	6.83	1.71	8.54	53.46
Sept.	240	.25	60.00	4.93	1.65	6.58	53.42
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	2.39	3.28	5.82	13.53
Nov.	233	.30	69.90	10.22	3.92	14.14	55.76
Dec.	232	.30	69.60	7.98	1.91	9.89	59.71
1940.							
Jan.	240	.30	72.00	13.29	2.16	15.45	56.55
Feb.	200	.30	60.00	8.77	1.80	10.57	49.43
Mar. 1-6	32	.30	9.60	.....	.....	2.10	7.50
	3,829		1,007.30	$87.67	$25.03	$114.80	$892.50

Busby, Cornelius.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	...	...	.....	.....	.....	.....	.....
Nov.	...	...	.....	.....	.....	.....	.....
Dec.	...	...	.....	.....	.....	.....	.....

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1939.							
Jan.	56	$ .25	$14.00	.....	.....	.....	$14.00
Feb.	176	.25	44.00	.....	.....	.....	44.00
Mar.	72	.25	18.00	.....	.....	.....	18.00
Apr.	32	.25	8.00	.....	.....	.....	8.00
May	96	.25	24.00	.....	.....	.....	24.00
June	56	.25	14.00	.....	.....	.....	14.00
July	40	.25	10.00	.....	.....	.....	10.00
Aug.	152	.25	38.00	.....	.....	.....	38.00
Sept.	128	.25	32.00	.....	.....	.....	32.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.....	.....	19.20
Nov.	241½	.30	72.45	$3.37	$5.65	$ 9.02	63.43
Dec.	240	.30	72.00	8.83	1.98	10.81	61.19
1940.							
Jan.	242¼	.30	72.68	9.59	2.18	11.77	60.91
Feb.	224	.30	67.20	10.74	2.02	12.76	54.44
Mar. 1-6	48	.30	14.40	.....	.....	3.55	10.85
	2,051¾		$565.93	$32.53	$11.83	$47.91	$518.02

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Jackson, Columbus;

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31.....	64	$ .25	$16.00	.....	.....	.....	$16.00
Nov.	240	.25	60.00	.....	.....	.....	60.00
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	232	.25	58.00	.....	.....	.....	58.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	232	.25	58.00	.....	.....	.....	58.00
May	244	.25	61.00	.....	.....	.....	61.00
June	228	.25	57.00	.....	.....	.....	57.00
July	240	.25	60.00	.....	.....	.....	60.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$3.61	$3.61	15.59
Nov.	240	.30	72.00	$8.76	4.59	13.35	58.65
Dec.	248	.30	74.40	8.54	2.05	10.59	63.81

Month 1940.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Jan.	248	.30	74.40	9.82	2.23	12.05	62.35
Feb.	232	.30	69.60	10.31	2.09	12.40	57.20
Mar. 1-6	48	.30	14.40	.....	.....	1.61	12.79
	3,952		1,042.00	$37.43	$14.57	$53.61	$988.39

Campbell, Scott.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	48	$ .25	$12.00	$2.92	$ .08	$3.00	$9.00

Barton, H. N.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	32	$ .25	$ 8.00	.....	.....	.....	$ 8.00
Nov.	216	.25	54.00	.....	.....	.....	54.00
Dec.	248	.25	62.00	.....	.....	.....	62.00

1939.							
Jan.	224	.25	56.00	.....	.....	.....	56.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	240	.25	60.00	.....	.....	.....	60.00
Apr.	241½	.25	60.38	.....	.....	.....	60.38
May	216	.25	54.00	.....	.....	.....	54.00
June	240	.25	60.00	.....	.....	.....	60.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	200	.25	50.00	.....	.....	.....	50.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.....	.12	.12	19.08
Nov.	240	.30	72.00	$1.39	$9.18	$10.57	61.43
Dec.	232	.30	69.60	9.93	1.91	11.84	57.76
1940.							
Jan.	248	.30	74.40	7.68	2.23	9.91	64.49
Feb.	232	.30	69.60	5.50	2.09	7.59	62.01
Mar. 1-6	48	.30	14.40	.....	.....	2.00	12.40
	3,817½		1,007.58	$24.50	$15.53	$42.03	$965.55

Kelton, Silas.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	...	...	.....	.....	.....	.....	.....
Nov.	...	...	.....	.....	.....	.....	.....
Dec.	56	$ .25	$14.00	.....	.....	.....	$14.00
1939.							
Jan.	40	.25	10.00	.....	.....	.....	10.00
Feb.	24	.25	6.00	.....	.....	.....	6.00
Mar.	8	.25	2.00	.....	.....	.....	2.00
Apr.	42½	.25	10.63	.....	.....	.....	10.63
May	85½	.25	21.38	.....	.....	.....	21.38
June	72	.25	18.00	.....	.....	.....	18.00
July	80	.25	20.00	.....	.....	.....	20.00
Aug.	56	.25	14.00	.....	.....	.....	14.00
Sept.	88	.25	22.00	.....	.....	.....	22.00
Oct. 1-23	32	.25	8.00	.....	.....	.....	8.00
Oct. 24-31	8	.30	2.40	.....	$ .63	$ .63	1.77
Nov.	43 2/3	.30	13.10	2.12	1.03	3.15	9.95
Dec.	56	.30	16.80	3.54	.46	4.00	12.80

1940.							
Jan.	82-2/3	.30	24.80	4.90	.74	5.64	19.16
Feb.	24	.30	7.20	2.17	.22	2.39	4.81
Mar. 1-6	8	.30	2.40	.....	.....	.55	1.85
	806-1/3		$212.71	$12.73	$3.08	$16.36	$196.35

Ellston, Russell.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	64	$ .25	$16.00	$ .88	$ .03	$ .91	$15.09
Nov.	240	.25	60.00	1.71	.05	1.76	58.24.
Dec.	248	.25	62.00	.....	.....	.....	62.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	240	.25	60.00	.....	.....	.....	60.00
May	248	.25	62.00	.....	.....	.....	62.00
June	232	.25	58.00	.....	.....	.....	58.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	232	.25	58.00	.....	.....	.....	58.00
Sept.	240	.25	60.00	.....	.....	.....	60.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	.96	.96	18.24
Nov.	241½	.30	72.45	.....	7.24	7.24	65.21
Dec.	248	.30	74.40	2.98	2.88	5.86	68.54
1940.							
Jan.	248	.30	74.40	7.08	2.65	9.73	64.67
Feb.	232	.30	69.60	9.15	2.09	11.24	58.36
Mar. 1-6	48	.30	14.40	.....	.....	2.36	12.04
	3,977½		1,048.45	$21.80	$15.90	$40.06	1,008.39

Bailey, Frank.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	8	$ .25	$2.00	.....	.....	.....	$2.00
Nov.	...	...	.....	.....	.....	.....	.....
Dec.	64	.25	16.00	.....	.....	.....	16.00

1939.							
Jan.	40	.25	10.00	.....	.....	.....	10.00
Feb.	40	.25	10.00	.....	.....	.....	10.00
Mar.	...	...	.....	.....	.....	.....	.....
Apr.	168	.25	42.00	.....	.....	.....	42.00
May	207	.25	51.75	.....	.....	.....	51.75
June	184	.25	46.00	.....	.....	.....	46.00
July	192	.25	48.00	.....	.....	.....	48.00
Aug.	216	.25	54.00	.....	.....	.....	54.00
Sept.	160	.25	40.00	.....	.....	.....	40.00
Oct. 1-23	72	.25	18.00	.....	.....	.....	18.00
Oct. 24-31	32	.30	9.60	.....	.....	.....	9.60
Nov.	10-2/3	.30	3.20	.....	$ .65	$ .65	2.55
Dec.	82¾	.30	24.82	$ .49	3.03	3.52	21.30
1940.							
Jan.	128	.30	38.40	6.45	1.15	7.60	30.80
Feb.	152½	.30	45.75	7.58	1.37	8.95	36.80
	1,156-11/12		$459.52	$14.52	$6.20	$20.72	438.80

Mathews, Everett.

Month 1938.	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company 1.	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	200	.25	50.00	.....	.....	.....	50.00
Dec.	208	.25	52.00	.....	.....	.....	52.00
1939.							
Jan.	208	.25	52.00	.....	.....	.....	52.00
Feb.	208	.25	52.00	.....	.....	.....	52.00
Mar.	224	.25	56.00	.....	.....	.....	56.00
Apr.	216	.25	54.00	.....	.....	.....	54.00
May	232	.25	58.00	.....	.....	.....	58.00
June	224	.25	56.00	.....	.....	.....	56.00
July	248	.25	62.00	.....	.....	.....	62.00
Aug.	248	.25	62.00	.....	.....	.....	62.00
Sept.	232	.25	58.00	.....	.....	.....	58.00
Oct. 1-23	176	.25	44.00	.....	.....	.....	44.00
Oct. 24-31	64	.30	19.20	.....	$3.39	$3.39	15.81
Nov.	224	.30	67.20	$2.22	4.58	6.80	60.40
Dec.	232	.30	69.60	5.03	1.91	6.94	62.66

1940.							
Jan.	226¼	.30	67.88	9.09	2.04	11.13	56.75
Feb.	216	.30	64.80	8.85	1.94	10.79	54.01
Mar. 1-6	28	.30	8.40	.....	.....	1.30	7.10
	3,670¼		967.08	$25.19	13.86	$40.35	$926.73

Southern, Frank.

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
1938.							
Oct. 24-31	56	$ .25	$14.00	.....	.....	.....	$14.00
Nov.	232	.25	58.00	.....	.....	.....	58.00
Dec.	224	.25	56.00	.....	.....	.....	56.00
1939.							
Jan.	248	.25	62.00	.....	.....	.....	62.00
Feb.	224	.25	56.00	.....	.....	.....	56.00
Mar.	248	.25	62.00	.....	.....	.....	62.00
Apr.	216	.25	54.00	.....	.....	.....	54.00
May	232	.25	58.00	.....	.....	.....	58.00
June	216	.25	54.00	.....	.....	.....	54.00

Month	Hours Worked	Rate Per Hour	Wages Earned	Wages Paid by Company	Taxes Paid by Company	Total Wages and Taxes Paid by Company	Balance Due
July	232	.25	58.00	.....	.....	.....	58.00
Aug.	240	.25	60.00	.....	.....	.....	60.00
Sept.	216	.25	54.00	.....	.....	.....	54.00
Oct. 1-23	184	.25	46.00	.....	.....	.....	46.00
Oct. 24-31	64	.30	19.20	.....	$1.44	$1.44	17.76
Nov.	225	.30	67.50	$3.24	6.54	9.78	57.72
Dec.	242¾	.30	72.83	4.48	2.00	6.48	66.35
1940.							
Jan.	224	.30	67.20	6.05	2.02	8.07	59.13
Feb.	208	.30	62.40	7.93	1.87	9.80	52.60
Mar 1-6	40	.30	12.00	.....	.....	1.60	10.40
	3,771¾		993.13	$21.70	$13.87	$37.17	$955.96

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Mr. Flanagan:

Yes, I think we have a brief prepared; I do not know how Your Honor prefers to handle the matter. We have a brief that we have gone into and done a great deal of work on.

The Court:

262 Mr. Flanagan:

I think we are about to the end of this, if Your Honor please, if you will give me a minute to check up. I think we have got it all in.

The Plaintiff rests.

The Court:

All right.

Mr. Payne:

The defendant rests, except we offer in evidence the stipulation too.

The Court:

Do you want to argue the case, gentlemen?

About how long do you want to argue it?

Mr. Flanagan:

I would say it would take an hour.

The Court:

An hour on the side, all right; is that satisfactory to the other side?

Mr. Payne:

I think that is satisfactory.

The Court:

Suppose you go ahead, Mr. Flanagan, and we will work for twenty minutes longer if you like.

Mr. Flanagan:

Mr. Franey will present the first part of our argument.

263 ORAL OPINION.

The Court:

The facts here disclose that for more than thirteen years prior to October, 1938, these men, as well as other men had been working on a tip basis, that is, they were being paid for their labor at the Union Terminal, the defendant's place of business, by tips that the public gave.

In June, 1938, the Fair Labor Standards Act was passed which fixed a minimum wage of twenty-five cents per hour for the first year. That statute became effective, as I recall, one hundred and twenty days after its final passage, which made it operative on October 24, 1938.

On October 22, 1938, the defendant, through its general manager at Dallas, notified each of the Red Caps, who are operating through the plaintiff here, that the defendant claimed that that act was applicable to them, and in order to comply with the provisions they should thereafter consider that the tips which they received from the public, and which had theretofore remunerated those red caps for work which they were doing for the defendant, would be used in part to pay them the minimum wage of twenty-five cents per hour. That if such tips did not amount to that much, that, then and in that event, the defendant would give them a sufficient amount to equal that legal requirement.

That letter was an offer of a contract of employment, and when it was received by the employee, that
264 employee had a reasonable time in which to answer it and let it be known whether or not he would agree to that new arrangement. Then, two days after the receipt of the letter, they notified the defendant that they would not agree to it. That they recognized the law as binding upon the defendant and upon themselves, and that they expected to follow its provisions, or words to that effect.

There was, therefore, no meeting of the minds of the defendant and its employees. There can be no contract under such a setting. That the minds had not met is further evidenced by the signal record evidenced in Article 16 of their agreement of January 1, 1940, where they again show that the matter was an open question. Also in December, 1938 a letter of the defendant shows its openness.

It is all beside the question to talk about being fifty for every one to take their places if they were let out. It is all beside the question to mention color. The law says nothing about color. The law says nothing about waiting unemployed to take the place of employees. The law says that every employer Shall pay every employee twenty-five cents an hour as a minimum wage.

I can hardly believe that a Congress, thoroughly familiar with the system of tipping in America, should in-
265 clude in the act the use of houses, and so forth, and leave out the word "tip", if they intended to permit the employer to get around the payment of this minimum wage by saying that the employee was receiving tips. I think it is a very wise system that a minimum wage only fixes the minimum and the maximum may be as much more as the employee can satisfactorily earn, to say otherwise would be quite unwise, it seems to me.

I would be a very poor judge, I think, to talk about the wisdom of legislation. No Court has anything to do with that. That is the business of the legislature—the business of the law-making body—and if these laws result in men, who have been making a fair living, losing their position, it is not the business of the Court. If and when the public finds out that the red caps are being paid by them, and that they are really employees of the Union Terminal Company, or the Railways, and, therefore ceases to pay the redcap anything, and thereby the railway companies cannot afford to keep them, that would be too bad, of course, for the redcap. That is a matter for the legislative branch of our government and not for the judiciary. The Court, I am sure, as many other citizens, feels quite seriously the trend of such legislation, but be that as it may, a Court that is not big enough to rise above his own feelings as to what a law should be, has no business to sit on the bench.

Sub-division M of Section 203, provides, "The
266 wage paid to any employee includes the reasonable cost determined by the administrator, or employer, of furnishing such employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employee."

That is the section of the law, I referred to awhile ago, as being of such a nature that had the Congress intended to liken it to tips, it would have said so.

I also call attention to the fact that section 206 provides what we already know, of course, and what has been referred to here, "that every employer shall pay to each of his employees who is engaged in commerce, or in the production of goods for commerce," and so forth, "the following wages." Section 215 provides certain prohibitive

acts, among which is transporting or offering for transportation, delivering articles by transportation in interstate commerce", and so forth, and this subdivision under that head enumerating a number of prohibited acts.

Section 216 provides that any person who willfully violates any provision of Section 215 shall, upon conviction thereof, be subject to a fine of not more than ten thousand dollars, or to imprisonment of not more than six months. Any employer who violates the provi-
267 sions of Section 206 or 207, of this chapter shall be liable to the employee affected to the amount of their minimum wages, and so forth.

So that one would be drifting without an excuse to seek to attempt to read into this statute something that is not in it. There is no ground for construction. It is plain, and says what shall be done and what shall not be done.

FINDINGS OF FACT

1.

I find that these plaintiffs had, for many years, more than thirteen, prior to October 24, 1938, been working for the defendant were paid by tips received from the public, and that they had received no remuneration from their employer.

2.

I find that the Union Terminal Company was employer of these redcaps at that time, and ever since.

3.

I find that these redcaps were engaged in interstate commerce.

I find that the redcaps and their employer, made no other contract on October 22, 1938, and have not made any since then. That neither the redcaps nor their employer saw fit to sever their former connections upon the expression of the views of each, as to the applicability of the Fair Labor Standards Act of 1938. That notwithstanding the expression of such views they continued to function together, and continued to recognize that the question of tips and wages was an open one between them.

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CONCLUSIONS OF LAW.

As a conclusion of law, I find, that the plaintiff must recover. That such recovery shall be the unpaid amount, or amounts, due each employee by the employer. That the amounts paid, as pleaded by the plaintiff and agreed to by the defendant, in the stipulation and pleadings, are to be deducted from any recovery in this judgment that shall be had for these men.

That such payment shall include, of course, the taxes that have been mentioned in argument and in the pleadings.

I find that to that amount shall be added an equal amount of the net portion as liquidated damages in favor of each.

I find a fee of $500.00, which I think is sufficient compensation for the plaintiffs' attorneys in this case, and the judgment shall include that.

The judgment, of course, will be written by the plaintiffs to be ok'd by Mr. Payne, or Mr. Robertson, or Mr. Hodges, as to form, saving such exceptions as they may wish.

The Court:

I shall later write a written opinion in accordance with what I have here said.

269 WRITTEN OPINION.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, General Chairman Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, duly authorized representative of James Foster, et al, plaintiff,

vs. Civil Action No. 248.

The Union Terminal Company, Defendant.

Suit under Fair Standards Wage Act.

Charles M. Hay, S. D. Flanagan, Edwin R. Franey, all of St. Louis, Missouri, and W. T. Savage of Dallas, Texas, for the plaintiff.

Robertson, Leachman, Payne, Gardere & Lancaster, Dallas, Texas, for the defendant.

270 The plaintiff, as agent and representative of forty-five redcaps, employees of the defendant, brings this suit for the minimum wages provided under the Act of June 25th, 1938. Sec. 216, sub-division (b).

He alleges that the defendant is a corporation existing by virtue of the laws of the State of Texas, and that it maintains and operates a railroad terminal, and terminal facilities, in the city of Dallas, used and necessary in the transportation of persons and property in interstate commerce.

That the redcaps, who are specifically named, and for whom he appears, in the capacity aforesaid, were employed by the defendant to handle hand-baggage, and traveling effects of passengers, and otherwise to assist passengers in their passage through said terminal. That substantially all the passengers so assisted were in transit to and among the several states of the union. That said employees were employed in interstate commerce, and their services were an essential part of the transportation of passengers and property among the said several states.

That under Section 6 of the Fair Labor Standards Act of 1938, 29 U. S. C. A. 206, it was required to pay to each of the said employees, wages of not less than twenty-five cents an hour from October 24th, 1938 to October 23rd, 1939, and not less than thirty cents an hour from
271 and after October 24th, 1939. That nothwithstanding such legal requirement it has failed and refused to pay the employees said minimum wage to the date of the filing of the suit, but has paid said employees only a small portion thereof.

It then sets out the exact number of hours that each employee worked at twenty-five cents, and the exact number of hours at thirty cents, showing the total wages earned; the exact amount paid to each employee and the balance due each; the total of such balance due, being $38,626.99.

He then alleges that the amount of $38,626.99, so made up of the items mentioned, is the amount that was received

in tips by the said redcaps from passengers at the defendant's terminal during the specified period.

He claims that the amount so paid by tips from passengers has never been paid by the defendant, and sues for that sum, plus the additional amount stipulated by the statute, as liquidated damages, and for the allowance by the Court of a reasonable attorney's fee.

The pleading of the defendant, the stipulations of the parties, and the testimony introduced, simplify the issues.

Those issues are: (a) whether the redcaps were engaged in interstate commerce; (b) whether they were employees of the defendant; (c) whether, having received tips from passengers, in the exact unpaid amount, such
272 tips may be considered, under the law, as having been paid in wages.

At argument, it was, and is now, conceded by the defendant, that the redcaps were, in truth, its employees. Such fact is clearly shown by its treatment of them, its issuance of passes to them, its rules for their guidance, its requiring them to handle bags and passengers regardless of whether they were paid therefor, by the owners of such bags, or by such passengers, by the furnishing to them of checks which they used on baggage, and by the fact that the defendant hired and discharged them, and otherwise exerted a supervision over them which clearly demonstrated the status of employer and employee. It will be borne in mind that sub-division (g) of Section 203 of the Act, defines "employ," to include, "to suffer, or, to permit to work," while sub-division (e) of the same section says that "employee" includes any individual employed by an employer.

The next issue is equally simple. Paragraph (b) of Section 203, provides that "commerce," "means trade, commerce, transportation, transmission, or, communication among the several states, or, from any state to any place outside thereof."

The stipulation and testimony indicate that about one-half of the passengers served by the redcaps are interstate; that a substantial part of the passengers
273 are interstate; that incoming trains from other states stop at the station, and the redcaps are required to unload the baggage of the passengers thereon, from the platform of the cars and place it on the station platform. They then carry it for those passengers from the station platform to the street. This, they are required to do, whether they receive tips or not. If a person is old, or, sick, or, crippled, and needs a wheel chair, such chair is furnished by the defendant and the redcap wheels the chair for the use of the person, and then wheels the person in the chair either to the place of embarking, or, to the place of disembarking from and to the street, whether paid by such person or not.

The railways which own the defendant's stock and use the terminal, are, the Texas and Pacific; the Missouri, Kansas and Texas; the Gulf, Colorado and Santa Fe; the Chicago, Rock Island and Pacific; the St. Louis and Southwestern; the Texas and New Orleans; the Frisco; and the Fort Worth and Denver. Each of these roads run from points in Texas to points outside of Texas, or have connection to and from outside the state. Their trains, so constituted, come into the terminal. The defendant has ticket offices, baggage facilities, and all of the machinery necessary for the delivery onto the trains and off of the trains, of persons and baggage so routed and traveling.

The rule which is now recognized, and which
274 has been reiterated, is, that the test of whether an employee is engaged in interstate commerce, is whether he was so engaged, or in work so closely related to such transportation as to be practically a part of it; whether he facilitates interstate commerce. Chicago and Northwestern Ry. Co. vs. Bolee, 284 U. S. 74; Kinzell vs. Chicago, M. & St. P. Ry. Co., 250 U. S. 130; L. & N. vs. Jollys Administratrix, 23 S. W. (2d) 564; Southern Pacific Terminal Co. vs. Interstate Commerce Commission, 219 U. S. 498; Spaw vs. Kansas City Terminal Ry. Co., 201 S. W. 927; Gus Mayer Co. vs. L. & N., 153 So. 249; Treadway vs. Terminal, 84 S. W. (2d) 143, and 136 S. W. (2d) 401; B. & N. vs. Burtch, 263 U. S. 540; Pudget Sound Stevedoring Co. vs. State Tax Commission, 302 U. S. 90; Santa Cruz Fruit Packing Co. vs. National Labor Relations Board, 303 U. S. 453; National Labor Relations Board vs. Fainbott, 306 U. S. 601.

There is nothing in the Pennsylvania Ry. Co. vs. Knight, 192 U. S. 21 which, upon close scrutiny, is contrary to this formidable line of recent authorities. The activities there, and the instruments, ante and post, interstate journeys, were on a different basis and in a different relation to the railway company to that disclosed in this case.

The third question is somewhat more difficult. It is more difficult because the penalty of the statute
275 makes the burden heavy on the erring employer. Careful counsel have called the Court's attention to the fact, as disclosed by the stipulation and testimony, that the redcaps who are suing here, have already received a little more than they were receiving before the law was passed. Any such considerations are not for Courts. If a law is plain, unambiguous and constitutional, the Court has nothing to do but to speak its enforcement, if and when called upon to act under it. This Act has

been found to be constitutional. Opp Cotton Mills vs. Administrator of Wage and Hour Division, Circuit Court of Appeals, Fifth Circuit, 111 Fed. (2d) 23; citing several Supreme Court cases. It was written in the interest of the employee. Its philosophy is not to limit a recovery to the minimum wage, but to guarantee such minimum wage. If betterments to the minimum wage are secured, there is nothing in the law that would strip them from the employee.

The payment of tips by the public, to the employee of another, is a gift to that employee and in the absence of any contract between the employee and employer that such tips shall be the property of the employer, they remain the property of the employee. A gratuity by the public to the employee of an employer cannot be a compliance with a plainly worded statute which requires the employer to pay the employee a certain sum.

276 A gift by an outsider to a servant does not discharge the debt of the master to the servant. Assuming that a master and servant may contract, which is not decided, that gifts received by servant shall be the property of the master, and used by both to liquidate part of what the master owes the servant, is not present in this case. There is no such agreement in this case.

On October 22nd, 1938, the defendant wrote a letter to each of the redcaps in its employ, advising them that on October 24th, the Fair Labor Standards Act would become effective, and that such tips as they received could be retained by them, and the defendant would make up the deficiency if such tips did not aggregate the minimum legal wage. Two days later, the redcaps replied, through their representative, that they could not agree to that procedure and that they intended to assert their rights under the law. Nothing was done by either side. Each con-

tinued to function as employee and employer. The status remained the same. No one was discharged and no one quit.

In December following, the defendant recognized by letter that the question of tips was an open question between it and the redcaps.

On January 1st, 1940, in a working agreement, which has been introduced in evidence, it was again
277 recognized that the question of tips was an open one, and that it would be decided by the Courts, and if decided against the defendant, it would respond.

Therefore, there was no meeting of the minds on the so-called new contract. For more than thirteen years they had been working together as heretofore indicated; the redcaps being paid entirely by tips which they received from the public, when they were paid at all. That arrangement could not be optionally terminated by one party without the consent and agreement of the other. When the offer to terminate it was made by the employer by letter, a reasonable time to accept, or, reject, was granted by the law. The answer coming within two days, it would appear that it was rejected within a reasonable time. The parties continued to act as they had theretofore acted.

The case Shuppan vs. Peoria Ry. Terminal Co., 30 F (2d) 569, can hardly be construed as persuasive in the present case. That was a short line which became financially involved, and a notice that the employees must accept a cut in wages was given. That cut was refused. Thereafter, the general manager posted a bulletin, announcing that beginning at a certain period, "you will receive on each pay-day, your proportionate share of the current income of the company; after allowing for the

payment of current bills for fuel, current sup-
278 plies, etc., and that the amount that you receive on each pay-day will constitute your full and final compensation for the period covered by such pay-day."

Again, the employees wrote that they expected the wages fixed by the United States Labor Board, and that they would not accept a lesser rate of pay. The company then began to pay the employees as announced in the bulletin. The paying checks were stamped, "payment in full for services in month of .....," or, "in full for services to date." Protests were made by the employee as the check was received. This continued for about a year and a half, and sometime later, when the road was in the hands of a receiver, claims were filed by the employees for the alleged deficiency in wages.

Under that situation, the Court said, "Clearly there was no formal contract betweeen the company and the employees that they would accept a smaller wage than they had been receiving. Looking, however, to the conduct of the parties, the conclusion is inescapable that they did so contract."

The facts here disclose, as already indicated, that there was a meeting of the minds and that such openness was disclosed by the defendant's recognition of the lack of an agreement in the December following October of 1938, and again in the working agreement between the parties on January 1, 1940.

There is also a statement in the opinion which
279 shows its inapplicability to the law, namely, "only the company can fix the wages of those who were willing to work for it." Under the present situation, the Congress has declared what the minimum wage shall be, and to that extent has superseded the right of employer

and employee to fix another, or, a different amount, unless the amount be in excess of the minimum. Again, the statement that if either the employer, or, employee, were dissatisfied with the terms of employment, one so dissatisfied could terminate the relationship. Of course, that is academic, but that liberty, which was once thought academic is now superseded by the language of this Act. The reasoner would not be considered even bold who states that an employee may agree to work for an employer for twenty cents an hour, and after such agreement bring suit and recover an amount equal to the legal minimum fixed by the Act.

The contract between the employee and his employer is worthless, so far as minimums are concerned, if such minimum is below the legal minimum, and if the work is the work described in the Act.

There has been a refinement of argument, pro and con, with reference to wages and tipping. An employee who receives tips from the public, and pays them to his employer in the absence of any contract, may recover them. Zappas vs. Roumelioute, 156 Iowa 709; Polites vs. Barlin, 149 Ky. 376.

Wages is the reward paid for labor; a compensation given to a hired person for his or her services. See in re Gurewitz, 121 F. 982. Wage is that which is paid for work, or, service, especially for work of a manual, mechanical, or, menial kind. It differs from salary. Subdivision (m) of Section 203 of the Act, provides that wages paid to any employee, includes the reasonable cost, as determined by the administrator, to the employer of furnishing employee with board, lodging, or, other facilities, if such board, lodging, or, other facilities are customarily furnished by such employer to his employee. The Congress thought, therefore, that that could be included as a

part of the wage which it described, if and when furnished by the employer. It would be remarkable to conclude that a congressman in 1938, was not familiar with the tipping practice. The Congress did not put into the Act anything else under the head of wages which might be construed into an inclusion of tips, which might be received by an employee, as a deduction from the legal wage provided for.

That tips are figured under the Social Security Act, or, the Compensation Act, in some states, in addition to the paid wage, as the aggregate basis for the determination of
281 benefits that the employee is to receive under those Acts, is no argument for including in a clear law the thought that it was intended that if an employee received a tip, while working under the Fair Standards Labor Act, his employer could deduct that amount from the minimum wage which he was bounden to pay under the law. Such a construction would be abortive and destructive. The Act uses the phrase, "shall pay" in describing the duty of the employer.

The Act also, in paragraph 216, carries criminal penalties as well as civil penalties. An Act so worded cannot be destroyed by reading into it something that is not justified.

Decree may go for the plaintiff for the amount sued for, plus liquidated damages in that amount, plus $500.00 attorney's fee.

(Signed) WILLIAM H. ATWELL,
United States District Judge.

Dallas, Texas, May 28th, 1940.

283 NOTICE OF APPEAL.

Filed July 22, 1940.

In the District Court of the United States for the Northern District of Texas, Dallas Division.

A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others, Plaintiff,

vs. Civil Action No. 248.

The Union Terminal Company, a Corporation, Defendant.

Notice Is Hereby Given that The Union Terminal Company, a corporation, defendant in the above styled and numbered cause, does hereby appeal to the Circuit Court of Appeals of the United States for the Fifth Circuit from the final judgment entered in this action on May 28th A. D. 1940.

ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for The Union
Terminal Company.

505 Republic Bank Building,
Dallas, Texas.

Copy of this notice has been mailed to Mr. W. T. Savage and Messrs. Hay & Flanagan, attorneys for plaintiff.

CONCISE STATEMENT OF THE POINTS ON WHICH THE UNION TERMINAL COMPANY, APPELLANT, INTENDS TO RELY ON APPEAL.

284 Filed July 22, 1940.

(Title Omitted.)

To A. J. Pickett, Plaintiff, W. T. Savage and Messrs. Hay and Flanagan, Attorneys for Plaintiff:

You are hereby notified that a concise statement of the points on which The Union Terminal Company, appellant, intends to rely on appeal of this cause is as follows:

I.

The Court erred in holding that this defendant employer's notice of October 22, 1938, given to each of its Red Cap employees setting out the terms and conditions of their future employment did not bind the latter in law by their conduct in continuing in service, collecting, reporting and retaining tips, and accepting payment of
285 the difference between the income received from tips and the minimum wage requirements from the defendant, because such clearly was a notice specifying conditions of future employment which in law was binding upon those employees thereafter continuing in service and accepting wages paid and based thereon, and said Red Caps rejected their only alternative of exercising their right to quit work if dissatisfied with the terms of future employment prescribed by the employer in said notice.

II.

The Court erred in holding that the letter of protest written to defendant employer on October 24, 1938, by A.

J. Pickett had the effect of depriving defendant of its right, exercised in its October 22nd notice, of prescribing the terms of future employment for its employees; because the Red Caps, by continuing in the service, accepted the conditions of such notice, and such conduct had the legal effect of contradicting anything said or implied in said protest letter; and further because, in any event, said protest letter does not purport to be or does not amount to a refusal to be bound by the terms imposed upon them in their future employment, but is merely a statement of a legal opinion that the legal effect of the method prescribed is not in compliance with the Fair Labor Standards Law.

III.

The Court erred in failing to hold that, regardless of whether or not there was an agreement to the terms of the October 22nd notice, the defendant complied with the Fair Labor Standards Law; because if, as held by the Court, the Red Caps are defendant's employees it must follow that the service rendered the patrons is furnished by the employer defendant; that, unlike gratuities given over and above the price of the service, the tips were given in payment of the service rendered by defendant
286 through the Red Caps, hence such payments for such service belonged in law to defendant, the one furnishing the service, and it had the right and power to control and dispose of such income belonging to it, which right and power it exercised by applying same on wages. It was unnecessary for it to follow the formality or mechanics of having such payments manually delivered to defendant and then manually delivering it back to the Red Caps as wages, as the method prescribed and followed had that legal effect.

IV.

The Court erred in rendering judgment for the plaintiff herein for wages in the sum of $38,626.99 because the plaintiff wholly failed to discharge the burden placed on him by law of alleging and proving that the $38,626.99, admittedly received by the Red Caps during the period, was paid to the Red Caps as a gratuity and was an amount over and above the amount paid by such patrons to and received by the company as compensation for the service rendered by the company to the patron through the Red Cap.

V.

The Court erred in holding that each of the Red Caps for whom this action is brought, was "engaged in commerce"; because the service performed by said Red Caps is purely local, forming no part of any interstate commerce and on the contrary is independently arranged for, directed and compensated for, not included in the price of ticket or arranged with and as a part of the interstate journey.

VI.

That under the pleadings and evidence, even though it be found that there was no contract making the retention of tips a payment of wages and that in the absence of such contract the tips collected and retained by the Red Caps were not wages paid by them, still it appears as a matter of law that said Red Caps, while acting in the
287 course of their employment for defendant collected payments made by the defendant's patrons in the form of tips for services rendered to the patrons by the defendant through the Red Caps, which payments as a matter of law belong to defendant and which exactly offset any claim for wages by plaintiff, so that a new trial

should therefore be granted. In the alternative, if the Court holds that such offset should be formally set up by way of counterclaim, defendant asks the Court to grant a new trial herein and allow a trial on the issues raised by defendant's counterclaim in accordance with defendant's application for leave to file and be heard on such counterclaim.

VIII.

Without waiving its position that no recovery should have been allowed but still insisting on same, defendant submits that in any event the Court erred in rendering judgment for "liquidated damages" in the amount of $38,626.90 over and above what was found by the Court to be unpaid minimum wages, because the evidence shows that defendant in good faith pursued a plan which it reasonably believed to be in compliance with the Fair Labor Standards Act, and in the defense of this action was in good faith litigating and seeking a judicial determination of a bona fide existing controversy as to whether or not there were due from it any "unpaid minimum wages" under the Fair Labor Standards Act, and should not in such circumstances be subject to the harsh penalties of the so-called "liquidated damages".

Respectfully submitted,
ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for Defendant.

505 Republic Bank Building,
Dallas, Texas.

A copy of this instrument has been mailed to W. T. Savage and Messrs. Hay and Flanagan.

288 SUPERSEDEAS APPEAL BOND.

Filed July 22, 1940.

(Title Omitted.)

Know All Men By These Presents: Whereas in the above entitled and numbered cause in the District Court of the United States for the Northern District of Texas, Dallas Division, at a regular term of Court, to-wit: on or about the 28th day of May, A. D. 1940, the plaintiff, A. J. Pickett, recovered a judgment for and on behalf of James Foster, Isaac Johnson, J. C. Franks, J. W. Brigham, Lemuel Brooks, A. R. Johnson, John Jefferson, O. A. Alexander, Joe Jackson, Nathan McIntosh, Nelson Turner, Allen Thomas, Richard Williams, Ulyssus Hollingsworth, J. T. Rurpin, Dave Campbell, Nelson Fields, C. H. Robertson, Haywood Hunt, Donald Spears, Clinton Hynson, J. P. Curry, Charles Langston, Charles Muckelroy, Felix Jackson, Paul Brigham, Arthur May, Theodore Jones, Tilson W. Cameron, William McMurray, Sam H. Williams, Earnest Amos, Harry Barton, Adolphus Wells, Alphonso Connor, Lawrence McNeil, Cornelius Busby, Columbus Jackson, Everett Mathews, Frank Southern, Scott Campbell, H. N. Barton, Silas Kelton, Frank Bailey and Russell Elston, as provided in said judgment, against the defendant, The Union Terminal Company, for the total sum of Seventy-Seven Thousand Seven Hundred Fifty-Three Dollars and Ninety-Eight Cents ($77,753.98), and all costs of suit, from which judgment defendant, The Union Terminal Company, desires to take an appeal to the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, and desires a stay on appeal:

289 Now, therefore, we, The Union Terminal Company, a corporation, as principal and United

States Fidelity and Guaranty Company, a corporation, as surety, acknowledge ourselves bound to pay to A. J. Pickett, plaintiff, and the above named persons, as their interests appear, the sum of One Hundred Thousand Dollars ($100,000.00), conditioned that the defendant, The Union Terminal Company, shall prosecute its appeal to final effect and shall satisfy the said judgment in full together with costs, interest and damages for delay, if any, if for any reason the appeal is dismissed or if the said judgment is affirmed, and shall satisfy in full such modifications of the judgment and such costs, interest, and damages as the appellate Court may adjudge and award, then the above obligation to be void; else to remain in full force and virtue.

Wherefore we hereunto set our hands this the 18th day of June, A. D. 1940.

THE UNION TERMINAL COMPANY,
By JOHN C. ROBERTSON,
ROBERT G. PAYNE,
GUS M. HODGES,
Its Attorneys, Principal.
UNITED STATES FIDELITY & GUARANTY COMPANY,
By H. R. WARREN,
(Corp. Seal) Attorney in Fact, Surety.

The amount of the Supersedeas Bond herein is fixed by the Court at the sum of One Hundred Thousand Dollars ($100,000.00) and the foregoing bond in said amount is hereby approved and ordered filed, this the 22nd day of July, A. D. 1940.

WM. H. ATWELL,
Judge of the United States District Court for the Northern District of Texas, Dallas Division.

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

290 Filed July 22, 1940.

(Title Omitted.)

To A. J. Pickett, Plaintiff, W. T. Savage, and Messrs. Hay and Flanagan, Attorneys for Plaintiff, and to the Clerk of said Court:

An appeal having been taken herein by The Union Terminal Company to the United States Circuit Court of Appeals for the Fifth Circuit, The Union Terminal Company, appellant, does hereby make designation of the portions of the records, proceedings and evidence to be contained in the record on appeal as follows, to-wit:

A full and complete record of all proceedings herein, including, but not limited to, the reporter's complete transcript of the evidence and proceedings including testimony of witnesses in questions and answers form as filed herewith, all pleadings, motions, orders, judgments and other papers filed herein.

Respectfully submitted,

291 ROBERT G. PAYNE,
JOHN C. ROBERTSON,
ROBERTSON, LEACHMAN,
PAYNE, GARDERE &
LANCASTER,
Attorneys for The Union Terminal Company.

505 Republic Bank Building,
Dallas, Texas.

A copy of the foregoing Designation of Contents of Record has been mailed to W. T. Savage and Messrs. Hay and Flanagan, attorneys for the plaintiff.

292 CLERK'S CERTIFICATE.

I, GEORGE W. PARKER, Clerk of the United States District Court for the Northern District of Texas, do hereby certify that the foregoing is a true and correct transcript of the record, and all proceedings in cause No. 248-Civil, Wherein, A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster, and Others, is Plaintiff, and The Union Terminal Company, a corporation, is Defendant, as fully as the same now remain on file and of record in my office at Dallas, Texas.

Witness my hand officially and the seal of said Court at Dallas, Texas, this the 26th day of July, A. D. 1940.

GEORGE W. PARKER,
(Seal) Clerk United States District Court, Northern District of Texas, at Dallas.
By MARY COUGER,
Deputy.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of February 5th, 1941

No. 9612

UNION TERMINAL COMPANY,

versus

A. J. PICKETT

On this day this cause was called, and, after argument by Robert G. Payne, Esq., for appellant, and Chas. M. Hay, Esq., and Edwin D. Franey, Esq., for appellee, was submitted to the Court.

F

OPINION OF THE COURT AND DISSENTING OPINION OF HOLMES, CIRCUIT JUDGE—Filed March 4, 1941

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 9612

UNION TERMINAL COMPANY,
Appellant,

versus

A. J. PICKETT,
Appellee.

Appeal from the District Court of the United States for the Northern District of Texas.

(March 4, 1941)

Before Foster, Sibley, and Holmes, Circuit Judges

SIBLEY, Circuit Judge: This case is similar to Williams vs. Jacksonville Terminal Company, this day decided, . . . Fed. (2) . . . except that on a trial without a jury the district court reached an opposite conclusion and rendered a large judgment for wages and damages against Union Terminal Company. The facts are about the same and need not be restated. The applicable law is the same and requires a like decision. It does not appear that any of the monies collected and retained by the red caps were

personal gifts and not compensation for the service which the Terminal Company hired them to perform; so that no contract was necessary to make them the money of the Company. The proceeds of the very thing the employee is hired to do belongs as a matter of law to the employer, even though it be so personal a thing as the brain child of an inventor. Standard Parts Co. vs. Peck, 264 U. S. 52. Though the red caps did not agree to the plan stated in the notice to them, they did continue at work and collected money for their services and accounted for it as required. The law had intervened to make the Company owe them a stated wage for those services, and in consequence to deprive them of the tips which previously were their compensation.

The argument that the former arrangement, though not a formal collective agreement, ought to be held unchangeable by the employer alone, cannot be sustained; both because there was no collective agreement that the tips should belong to the red caps, and because a collective agreement would not avail against changes wrought by a statute.

Now do we think it lies in the red cap's mouth to say that the whole idea of letting the passenger fix the amount of compensation for porter service is repugnant to the Interstate Commerce Act as discriminating in favor of the passenger who pays less and against one who pays more. But if they can urge it, and if this is a transportation service requiring uniformity of charge, and if a court rather than the Interstate Commerce Commission may deal with it, the wrong would not be righted by giving the red cap this money and double wages besides.

Nothing specially urged in this case differentiates it from that of the Jacksonville Terminal Company. The judgment is reversed and the cause remanded for further consistent proceedings.

HOLMES, Circuit Judge, dissenting:

I think the burden of proving that tips were not gifts of gratuities is wrongly placed upon the appellees in the majority opinion. In the absence of such proof, the word should be given its usual and ordinary meaning.

I dissent for the above and the further reasons stated by me in the case of Williams, Individually, etc., et al., v. Jacksonville Terminal Company, No. 9754, this day decided.

JUDGMENT

Extract from the Minutes of March 4th, 1941

No. 9612

UNION TERMINAL COMPANY,

versus

A. J. PICKETT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further consistent proceedings;

It is further ordered, adjudged and decreed that the appellee, A. J. Pickett, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Holmes, Circuit Judge, dissents."

ORDER DENYING REHEARING

Extract from the Minutes of April 2nd, 1941

No. 9612

UNION TERMINAL COMPANY,

versus

A. J. PICKETT

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Holmes, Circuit Judge, dissents."

MOTION AND ORDER STAYING MANDATE—Filed April 7th, 1941

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9612

THE UNION TERMINAL COMPANY, a Corporation, Appellant,

vs.

A. J. PICKETT, Appellee

APPLICATION FOR STAY OF MANDATE

To the Honorable Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

Comes now the appellee, A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, duly authorized representative of James Foster and others, and respectfully represents that he desires to file in the Supreme Court of the United States a petition for a writ of certiorari to review the judgment of this Honorable Court rendered in this cause reversing the judgment of the District Court of

the United States for the Northern District of Texas and remanding this cause.

Wherefore, appellee respectfully applies for an order of this Honorable Court staying the mandate herein for a reasonable time in order to allow appellee an opportunity to prepare and present his petition for a writ of certiorari to the Supreme Court of the United States.

(Signed) Charles M. Hay, S. D. Flanagan, E. D. Franey, Attorneys for Appellee.

A copy of the foregoing application for stay of mandate was mailed to Messrs. Robert G. Payne, Neth L. Leachman, John C. Robertson, Roberston, Leachman, Payne, Gardere and Lancaster, Dallas, Texas, attorneys for appellant, this 4th day of April, 1941.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9612

UNION TERMINAL COMPANY, Appellant,

versus.

A. J. PICKETT, Appellee

On Consideration of the Application of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall

issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 7th day of April, 1941.

(Signed) Rufus E. Foster, United States Circuit Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 1023

ORDER ALLOWING CERTIORARI—October 13, 1941

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

A petition for rehearing having been submitted in this case,

Upon consideration thereof, it is ordered by this Court that the petition for rehearing be, and the same is hereby, granted.

And it is further ordered that the order denying certiorari be, and the same is hereby, vacated; and that the petition for writ of certiorari herein be, and the same is hereby, granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 25 1941
CHARLES ELMORE CROPLEY
CLERK

No. 1023.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of JAMES FOSTER and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

PETITION

Of A. J. Pickett for a Rehearing of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

CHAS. M. HAY and
S. D. FLANAGAN,
506 Olive Street,
St. Louis, Missouri,
Attorneys for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street, CEntral 4477.

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Senate Resolution No. 105, May 15, 1941 (87 Congressional Record [Advance Sheets] No. 91, page 4209)	2
The American Labor Legislation Review, March, 1941, paper by Mary A. Anderson, "Tips in Relation to Minimum Wages"	5

No. 1023.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of JAMES FOSTER and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

PETITION

Of A. J. Pickett for a Rehearing of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Comes now A. J. Pickett, general chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, duly authorized representative of James Foster and others, petitioner in the above-entitled cause, and files this his petition for a

rehearing of his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit; and for grounds therefor states:

I.

Since the filing of the petition for a writ of certiorari in this court on May 5, 1941, Senate Resolution No. 105 was enacted by the Senate of the United States on May 15, 1941 (87 Congressional Record [advance sheets] No. 91, page 4209). This resolution reads as follows:

> "Resolved, that the Administrator of the Wage and Hour Division of the United States Department of Labor, or his designated representatives, is hereby directed to undertake immediately an inquiry into the wages, hours and other conditions and practices of employment of redcaps by railroads or terminal companies in view of the minimum wage requirements of the Fair Labor Standards Act of 1938 (52 Stat. 1060), under his investigatory powers under said Act, and to ascertain and report to the Senate—
>
> "(1) The extent to which said conditions and practices violate the letter or the spirit of the Fair Labor Standards Act of 1938 or other federal statutes, if at all;
>
> "(2) The extent to which said conditions and practices are susceptible to regulation under the Fair Labor Standards Act in its present form; and
>
> "(3) What legislation, if any, should be enacted for the purpose of further regulating wages, hours or other conditions and practices of employment of redcaps under the Fair Labor Standards Act of 1938.
>
> "The Administrator shall give a full opportunity to both the employees and the employers to present publicly any evidence, information, data or argument they may care to present, and shall report such evidence and other data to the Senate with his findings and conclusions."

Your petitioner, having had no knowledge that this resolution was before the Senate, did not, of course, in his petition for certiorari or brief in support thereof urge this fact, or point out how this resolution made it not only highly desirable, but, in fact, imperative, that this Court authoritatively settle the questions involved herein, so that your petitioner must endeavor to do so in this petition for a rehearing.

The resolution, it will be noted, calls upon the Administrator of the Wage and Hour Division to ascertain and report to the Senate the extent to which the conditions and practices of employment of redcaps by railroads or terminal companies are susceptible to regulation under the Fair Labor Standards Act in its present form, and what legislation, if any, should be enacted for the purpose of further regulating wages, hours or other conditions and practices of employment of redcaps under the Fair Labor Standards Act. Now, it is apparent that in order for the Administrator to report to the Senate, and in order for the Senate to be informed of, the extent to which the conditions and practices of the employment of redcaps, and particularly the accounting and guarantee arrangement, and the inclusion of tips as wages, are susceptible to regulation under the Fair Labor Standards Act in its present form, it is necessary for the Administrator to know, and for the Senate to know, just what is to be the final construction placed upon the act by the courts—and there can be no final construction until this Court has spoken. While the resolution does not expressly refer to the accounting and guarantee plan adopted by the railroads, nor the question of whether tips may be included as wages, they, of course, as this Court knows, have been the real bones of contention in the relations between the redcaps and the railroads under the Fair Labor Standards Act, and the Administrator will be expected to inform the Senate in obedience to

the resolution the extent to which these "conditions and practices of employment of redcaps" may be regulated under the act in its present form, and "what legislation, if any, should be enacted for the purpose of further regulating * * * conditions and practices of employment of redcaps."

It is obvious that an expression by this Court on these vexing questions is absolutely essential before it may be determined whether the act in its present form as construed by the courts is sufficient, or whether it should be amended in order that its operation may result in benefiting those employees whom it was the intention of Congress to benefit, rather than making their condition worse. Your petitioner respectfully urges that this Court should lend its assistance to the Administrator of the act and to Congress by an authoritative construction of the act, so that Congress, being apprised of the construction of the language it used in the act, may intelligently change that language if its real intention was not correctly expressed thereby, or leave it stand in its present form if it was.

II.

Your petitioner feels that he perhaps did not stress sufficiently the importance of an authoritative interpretation of the language used in the Fair Labor Standards Act by this Court to the thousands of employees throughout the nation other than redcaps who receive tips, and to their employers. The great number of such employees was, through inadvertence of counsel for the petitioner, not brought to the Court's attention in the petition for certiorari, and hence your petitioner wishes to take the opportunity to do so in this petition for rehearing.

It is, of course, impossible to obtain any absolutely accurate figures as to the number of workers engaged in

occupations where tipping is prevalent, but in the issue of the Monthly Labor Review for December, 1937, published by the Bureau of Labor Statistics of the United States Department of Labor, Volume 45, No. 6, page 1305, it is said that the number so engaged during the year 1935, exclusive of bootblacks, was 869,674.

That the question of whether tips received by an employee should be included as part of the minimum wage prescribed by statute is one of great importance is evidenced by the following excerpt from a paper written by Mary A. Anderson, Director of the United States Women's Bureau, United States Department of Labor, entitled "Tips in Relation to Minimum Wages," and published in the March, 1941, issue of The American Labor Legislation Review:

> "Our second principle is that tips should not be counted as part of the legal minimum wage. For example, if $16 is established as the legal wage, the employer should not be permitted to pay the worker only the difference between the tips she receives and the minimum wage of $16. If the contrary policy were followed, the employee would be required to report to her employer the amount of tips received each week, in order that he in turn could know the amount of wages he must pay to make up the $16.
>
> "If this practice were followed the purpose of the minimum wage law would soon be defeated. It would not be long before employers discovered which of their employees are costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would

be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate coworkers. There is always one effective way out of a situation like this for a worker who is desperately in need of a job, and that is to report to her employer a greater amount of tips than she actually receives. The whole purpose of the minimum wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation."

Your petitioner respectfully submits that the principle that tips should not be counted as part of the legal minimum wage, as Miss Anderson contends, has much to support it, and that Congress, by providing in Section 3 (m) of the Fair Labor Standards Act that the word "wage" should include certain things without mentioning tips, recognized this principle. This Court should, we believe, decide whether the language used by Congress sufficiently declared this principle, so that Congress may know whether an amendment of the act is necessary.

III.

This Court may have felt that certiorari should not have been granted in view of the apparent unanimity of the cases so far decided, all being decided against the redcaps. Your petitioner wishes to point out now, as perhaps he failed to do in his petition for certiorari and supporting brief, that there is actually a conflict between the decision of the Fifth Circuit Court of Appeals in this case and the decision of the District Court for the Western District of Missouri in the case of Harrison v. Kansas City Terminal Railway Company, 36 Fed. Supp. 434, the only other redcap case in which any opinion was written. We appreciate, of course, that the fact that a conflict appears

between a decision of a circuit court of appeals and a district court in another circuit is not in itself grounds for this Court issuing its writ of certiorari, but we believe such conflict may be considered with the fact that important questions of federal law which have not been, but should be, settled by this Court are involved. The Circuit Court of Appeals for the Fifth Circuit, in the case at bar held (118 F. [2d] 328) that the tips received by the redcaps were the property of the terminal company, so that no contract was necessary to make them the property of the company. Judge Otis, however, in the Kansas City Terminal Railway Company case, held (36 Fed. Supp. 434, l. c. 439) that "in the absence of an agreement upon the part of an employee to turn over his tips to his employer, tips received by the employee are the property of the employee," and that absent such an agreement, as he found there was, on the part of the redcaps, whereby they accepted the accounting and guarantee arrangement as part of their employment contract, they would have been entitled to recover, saying (l. c. 437):

> "I shall consider the question with three different assumptions. 1. I shall assume that arrangement between the defendant and the redcaps which was in existence before the enactment of the Fair Labor Standards Act and the coming into being of the Accounting and Guaranty Arrangement. 2. I shall assume a certain hypothetical arrangement touching the disposition of tips. 3. I shall assume the Accounting and Guaranty Arrangement entered into between the redcaps and defendant.
>
> Assumption No. 1.
>
> "(1, 2) It does not seem to me that any real problem is presented under Assumption No. 1. To say that, within the intention of Congress as expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept

tips from travelers is to assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so. It intended that the reasonable cost of board and lodging furnished by the employer should be included, and it said so. Sec. 203 (m). The conclusion is that if the simple situation here assumed were that presented in this case plaintiff undoubtedly would be entitled to prevail, at least to the extent of recovering the minimum wages required to be paid."

It is apparent that the decision of Judge Otis in the Kansas City case is in direct conflict with the decision of the Fifth Circuit Court of Appeals in this case, as Judge Otis clearly holds that, absent an agreement on the part of the redcaps to turn over their tips or that the tips shall be the property of their employer, the tips are the property of the redcaps, whereas the Fifth Circuit Court of Appeals holds that the tips are the property of the employer irrespective of any consent or agreement on the part of the redcaps.

Your petitioner respectfully submits that the great public importance of the questions involved herein may not have been sufficiently impressed upon the Court at the time it denied the petition for certiorari herein, and in view of the importance of these questions, not only to redcaps throughout the nation, but to others employed in tipping occupations, and in view of the evident great concern of Congress about the subject, this Court should issue its writ

of certiorari to review the judgment of the Circuit Court of Appeals for the Fifth Circuit to the end that the law may be clarified and settled by a decision of this Court.

Respectfully submitted,

CHAS. M. HAY and
S. D. FLANAGAN,
Attorneys for Petitioner.

Certificate of Counsel.

Charles M. Hay and S. D. Flanagan, attorneys for the petitioner in the above-entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay, and is believed by them to be meritorious.

CHARLES M. HAY,
S. D. FLANAGAN,
Attorneys for Petitioner.

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No. 1023 (October Term, 1940).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S STATEMENT, SPECIFICATION OF ERRORS AND ARGUMENT.

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IN THE

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A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITIONER'S STATEMENT, SPECIFICATION OF ERRORS AND ARGUMENT.

OPINIONS BELOW.

The oral opinion, findings of fact, conclusions of law, and written opinion of the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas may be found at R. 276-290. The written opinion of said District Court is reported in 33 F. Supp. 244.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit may be found at R. 301-303, and is reported in 118 F. (2d) 328.

JURISDICTION.

The jurisdiction of this Court is based upon Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stats. 938, U. S. C. A., Title 28, Section 347. The judgment of the United States Circuit Court of Appeals for the Fifth Circuit sought to be reviewed was entered March 4, 1941 (R. 304). A petition for a rehearing was filed March 24, 1941, within the time provided by the rules of said Circuit Court of Appeals (R. 305), and the petition for a rehearing was denied April 2, 1941 (R. 310).

The petition for a writ of certiorari was filed in this court May 5, 1941, and was granted October 13, 1941.

STATEMENT OF THE CASE.

This suit was instituted by petitioner, who had been duly designated as agent and representative of certain redcap employees of the respondent at its passenger terminal in Dallas, Texas, pursuant to Section 16 (b) of the Fair Labor Standards Act of 1938, by filing a complaint in the District Court of the United States for the Dallas Division of the Northern Judicial District of Texas, to recover for said redcaps unpaid minimum wages alleged to be due them under Section 6 (a) of said act, together with an equal amount as liquidated damages and attorney's fees.

For more than thirteen years the redcaps had been employed by respondent, receiving no wages, but depending solely on tips or gratuities of passengers whom they served. On September 29, 1938, the Interstate Commerce Commission, acting under authority conferred upon it by Section 1, Fifth, of the Railway Labor Act, in a proceeding before it known as Ex Parte 72 (Sub. No. 1), held that redcaps at stations and cities of over one hundred thousand population were employees for the purposes of the

Railway Labor Act (R. 195). Thereafter, on October 11, 1938, all of the redcaps involved in this action, constituting almost all the redcap employees of respondent, and a majority of such employees, executed and delivered to respondent an instrument (R. 139-141) whereby they designated the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as their duly authorized and accredited representative for the purposes of the Railway Labor Act, and authorized said organization to enter into negotiations with respondent for the purpose of making a working agreement covering their conditions of employment, and to do all other things in connection therewith having for its purpose the making and maintaining of an agreement between respondent and said redcaps. On the same date petitioner herein, who is General Chairman of said Union Terminal System Board of Adjustment, wrote respondent's vice-president and general manager (R. 141-143) advising him of the ruling of the Interstate Commerce Commission holding that redcaps were employees for the purposes of the Railway Labor Act, and of the fact that the redcaps had authorized the Union Terminal System Board of Adjustment to represent them in the making of a working agreement as contemplated by the Railway Labor Act, and that they were, therefore, serving notice upon respondent of the action of the employees, and were advising the respondent that they were prepared to exhibit to it the authorizations that were executed by the redcaps, and were asking for a conference under the terms of the Railway Labor Act for the following purposes: (1) to exhibit to respondent the authorizations executed by the employees authorizing said board of adjustment to act for the redcaps, and (2) for the purpose of negotiating an agreement covering their working conditions and other related subjects. This letter

concluded with a request that petitioner be advised of the time, date and place that would be agreeable to respondent to hold a conference for the aforesaid purposes.

Respondent did not answer this letter of petitioner, but on October 22, 1938, served upon each redcap employed by it a notice (R. 127) reading as follows:

"Dallas, Texas, October 22, 1938.

"To: Redcaps,
The Union Terminal Company.

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such service.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938 compensation which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service and the accounting required.

"The Union Terminal Company,
By Murrell L. Buckner,
Vice-President & Gen. Manager."

The redcaps did not reply individually to this notice, but petitioner, as their representative, wrote a letter to respondent's vice-president and general manager October 24, 1938 (R. 128-130), protesting against the arrangement sought to be imposed by respondent set forth in the notice of October 22, 1938. This letter reads as follows:

"The Union Terminal Company System Board of
Adjustment Brotherhood of Railway
and Steamship Clerks,
A. J. Pickett, General Chairman,
709 Equitable Building,
St. Louis, Mo.

"October 24, 1938.

"Mr. Murrell L. Buckner,
Vice-President and General Manager
The Union Terminal Company,
Dallas, Texas.

"Dear Sir:

"I have a copy of a circular issued by your Company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed: i. e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by persons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"'Fair Labor Standards Act:

"'Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

"'(1) during the first year from the effective date of this section, not less than 25 cents an hour.'

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the Administrator, we are accordingly filing this notice of protest, for the reasons set forth herein.

Yours truly,

(Sgd.) A. J. Pickett,

General Chairman."

Thereafter petitioner and respondent's general manager conferred with a view of negotiating a working agreement covering the redcaps employed by respondent. During the period covered by these conferences respondent's vice-president, under date of December 6, 1939, wrote a letter (R. 153, 154) to petitioner referring to a proposed agreement and stating "as I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day is in the Court, and as soon as same is decided, we will be glad to negotiate an agreement with the Clerks' Union of which you are the general chairman for the company." A working agreement was finally entered into between respondent and the Brotherhood of Railway and Steamship Clerks,

effective January 1, 1940, rule 16 of which (R. 134) provided that if a redcap was improperly suspended or dismissed, and after a hearing was reinstated, he should be reimbursed for any money losses suffered, provided that it was subsequently determined that under the provisions of the Fair Labor Standards Act the carrier was required to pay a wage to the redcap over and above any amounts that might be received by him as tips. Testimony was introduced to the effect that from October 22, 1938, to the date of the trial, the redcaps at no time withdrew their protest against the arrangement described in respondent's notice of October 22, 1938 (R. 199 and 206).

During the period from October 24, 1938, to February 28, 1939, each of the redcaps reported daily on a form furnished by respondent the amount of tips he had received, and respondent twice each month paid, in every case where the tips reported did not equal the minimum wage provided by the Fair Labor Standards Act, the difference between the tips reported and the minimum wages earned during the preceding half month. **During the period from March 1st to October 15th, 1939, the redcaps, pursuant to instructions of respondent, did not report their tips** (R. 130), but respondent advised them that it would assume, unless reported to the contrary, that for each work period after February 28, 1939, each redcap collected in tips at least an amount equivalent to the number of hours worked multiplied by 25 cents, and that should any redcap receive less than that amount during any work period, he should report it to respondent, and respondent would pay any difference between the amount of tips collected and the amount produced by multiplying the number of hours worked by 25 cents, and that each of said redcaps should fill in a form showing the hours worked during the day for each day worked. It was agreed that during this period each redcap collected in tips during each work period

an amount equal to or in excess of the number of hours worked during the work period multiplied by 25 cents (R. 131). From October 16, 1939, to March 6, 1940, the day preceding the filing of this suit, each redcap reported daily the tips he received, and where the tips received during any work period were less than the minimum wages earned, respondent paid the difference between the tips and the minimum wages (R. 131, 132).

Judgment was entered by the District Court in favor of petitioner and against respondent (R. 39, 41) for unpaid minimum wages in the sum of $38,626.99, liquidated damages in an equal amount, and attorney's fees in the sum of $500.00, totaling $77,753.98. The District Court based its decision on the grounds (a) that the payment of tips by the public to the employee of another was a gift to that employee, and in the absence of any contract between the employee and employer that such tips should be the property of the employer, they remained the property of the employee, and (b) that a gratuity paid by the public to the employee of an employer cannot be a compliance with a plainly worded statute which requires the employer to pay the employee a certain sum. The Court referred to petitioner's letter to respondent's vice-president and general manager, dated October 24, 1938, the letter of this official dated December 6, 1939, and rule 16 of the working agreement of January 1, 1940, and held that under these circumstances there was no meeting of the minds of the parties on the terms of respondent's notice of October 22, 1938, and that, consequently, the notice did not effect any change in the existing arrangement between the parties; that, therefore, the tips remained the property of the redcaps, and could not be considered payment of wages by respondent (R. 286-290).

The Circuit Court of Appeals for the Fifth Circuit in a majority opinion written by Judge Sibley and concurred in

by Judge Foster (R. 301) followed its opinion in the case of Williams v. Jacksonville Terminal Company, 118 F. (2) 324, decided by it the same day, and reversed the judgment of the District Court, and remanded the cause for further consistent proceedings (R. 304). The Court reasoned that it did not appear that the moneys collected by the redcaps were personal gifts and not compensation for the service which respondent hired them to perform, and that no contract was necessary to make the tips the money of the respondent; that although they did not agree to the plan stated in respondent's notice of October 22, 1938, they did continue to work and collected money for their services and accounted for it as required, and that the law intervened to make respondent owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously were their compensation. The Court held that petitioner's argument that the former arrangement, though not a formal collective agreement, ought to be held unchangeable by the employer alone, could not be sustained; both because there was no collective agreement that the tips should belong to the redcaps, and because a collective agreement would not avail against changes wrought by a statute.

Judge Holmes, dissenting, held that the word "tip" should be given its usual and ordinary meaning, and that if what the redcaps received were gifts or gratuities, they had the right to keep them for themselves, and that if Congress had intended that tips should be included in the meaning of the word "wages" it would have said so.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the tips received by the redcaps were not personal gifts to the redcaps, but were compensation for services which respondent hired them to perform, so that no contract was necessary to make the tips the property of respondent.

2. In holding that the Fair Labor Standards Act had intervened to make respondent owe the redcaps a stated wage, and in consequence to deprive them of the tips which the Court said were previously their compensation.

3. In holding that even though a majority of the redcaps had designated a representative under the Railway Labor Act for collective bargaining purposes, and a conference had been requested of respondent by said representative to negotiate a working agreement for said redcaps, respondent by unilateral action on its part and without exerting every reasonable effort, as required by Section 2 of the Railway Labor Act, to make an agreement with the redcaps, could effect a change in the existing arrangement under which the tips belonged to the redcaps so as to appropriate said tips for the payment of the minimum wage.

4. In holding that respondent's notice to the redcaps was sufficient to make the tips received by them the money of respondent, as said notice did not claim ownership of the tips, but merely offered to pay any difference between the minimum wages and the tips received on the theory that tips were wages under the Fair Labor Standards Act.

5. In holding that the accounting and guarantee plan was a compliance with the Fair Labor Standards Act because the plan will not carry out the purposes of Congress,

since it permits of easy evasion of the obligations imposed thereby, shifts the burden of keeping records from the employer to the employee, although Section 11 (c) of the Act requires the employer to keep records necessary to show compliance with the act, and is conducive to labor disputes burdening and obstructing commerce.

6. In failing to hold that in the absence of an agreement to the contrary, tips received by the redcaps were their property, and were not under the Fair Labor Standards Act wages paid by respondent, and that there was no agreement between the parties that the tips should be the property of respondent, and hence judgment in favor of petitioner should have been affirmed.

SUMMARY OF THE ARGUMENT.

I.

The tips received by the redcaps in the absence of a contract between them and respondent providing that the tips would be the property of respondent were the property of the redcaps.

Polites v. Barlin, 149 Ky. 376, 41 L. R. A. (n. s.) 1217, 149 S. W. 828;
Zappas v. Roumeliote, 156 Iowa 709, 137 N. W. 935;
McRae v. McBeath, 5 N. B. 446;
Booker v. Pennsylvania Railroad, 82 Pa. Super. 588;
Powers Case, 275 Mass. 515, 176 N. E. 621;
Harrison v. Kansas City Terminal Railway Company, 36 Fed. Supp. 434, l. c. 439.

The Fair Labor Standards Act did not affect the ownership of the tips so as to make them the property of respondent.

II.

Under the arrangement existing when respondent's notice of October 22, 1938, was served on the redcaps, they had the right to retain all tips received. This arrangement was never changed despite respondent's notice because (a) the redcaps did not accept the accounting and guarantee plan, but, on the contrary, protested against it, and the parties by their conduct thereafter recognized that there had never been a meeting of the minds thereon, and (b) respondent could not by its unilateral action effect a change in the arrangement in view of the redcaps' previous designation of a representative for collective bargaining purposes, and request for a conference to negotiate a collective agreement under the Railway Labor Act

without first exerting every reasonable effort to make an agreement with said representative.

Virginian Railway Company v. System Federation No. 40, 57 Sup. Ct. 592, 300 U. S. 515, 81 L. Ed. 789;

Railway Labor Act, Section 2, 45 U. S. C. A. 152.

III.

Even if it should be held that the accounting and guarantee notice became a part of the employment contract of the redcaps, nevertheless, the notice did not effect any change in the ownership of the tips received by the redcaps after that date so as to make them the property of respondent, which could be used by respondent to pay wages to the redcaps, as the respondent did not by said notice claim ownership of the tips, but said notice was merely an assertion by respondent of its opinion that tips were wages under the Fair Labor Standards Act, and that it was only bound to make up the difference between the tips received and the minimum wages earned.

IV.

Congress in using the language "Every employer shall pay to each of his employees engaged in commerce • • • wages" at certain rates, expressed its intention that a direct wage payment from the employer should be the means of carrying out the purposes of the act. Its purpose will be defeated if the accounting and guarantee plan is held to be a compliance with the act.

(a) One of the purposes of the act is to eliminate unfair competition in commerce by reason of one employer paying substandard wages to his employees, while another who competes with him pays a higher wage.

Title 29, U. S. C. A., Sec. 202.

This purpose will not be carried out if defendant is per-

mitted to obtain the labor of the redcaps without paying wages therefor, while another employer must pay his employees wages.

(b) The accounting and guarantee plan will not carry out the intention of Congress, since it permits of easy evasion of the duties imposed thereby.

(c) The purpose of the act is not carried out by the accounting and guarantee plan because it shifts the burden of keeping records from the employer to the employee, although section 11 (c) of the act requires the employer to keep the records necessary to show compliance with the act.

> Section 11 (c), Fair Labor Standards Act of 1938 [Title 29, U. S. C. A., Section 211 (c)].

(d) The accounting and guarantee plan will not carry out the purpose of the act since it is conducive to labor disputes burdening and obstructing commerce.

Since the duty of the employer under the act to pay each of his employees engaged in commerce wages at the minimum rates is plain, there is no occasion for construction.

> United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278 U. S. 269, 72 L. Ed. 322;
>
> Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778;
>
> Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778.

V.

Even if the Court should hold that the accounting and guarantee notice became a part of the employment contract of the redcaps and that the plan was a compliance with the Fair Labor Standards Act, the plan was abandoned by respondent during the period from March 1, 1939,

to October 15, 1939, during which period the redcaps were instructed by respondent not to report their tips, and hence petitioner is at least entitled to recover wages and liquidated damages for this period.

VI.

Tips received by an employee are not wages paid by the employer and may not be considered in determining whether the employer has complied with the Fair Labor Standards Act.

Sections 6 and 3 (m) of the Fair Labor Standards Act of 1938 [29 U. S. C. A., Sections 206 and 203 (m)];

Roberts v. Frank Carruthers and Bros., 202 S. W. 659, 661;

Gay v. Hudson River Electric Power Company, 178 Fed. 499, 503;

Moore v. Heaney, 14 Md. 558;

Ford v. St. Louis etc. Railway Company, 54 Iowa 728, 7 N. W. 126, 128;

Massie v. Cenna, 28 L. R. A. (n. s.) 1108, 239 Ill. 352, 88 N. E. 152;

Colver v. Foster Screen Company, 99 N. J. Eq. 734;

La Juett v. Coty Machine Company, 272 N. Y. S. 822;

First National Bank of Wilkes-Barre v. Barnum, 160 Fed. 245;

Booker v. Pennsylvania Railroad Co., 82 Pa. Super. 588;

Alexander Hamilton Hotel Corporation, Prosecutor, v. Board of Review of the New Jersey Unemployment Compensation Commission et al., Defendants, decided by the Supreme Court of New Jersey, September 16, 1941, being case No. 208 for the January Term, 1941.

Decisions of the courts holding tips to be earnings of an employee for the purposes of Workmen's Compensation Acts are not in point for the reason that said acts use

broader terms, such as "earnings" or "remuneration," instead of the narrower term "wages," and for the further reason that compensation acts must be construed so that employees will get the benefit of tips received from their employment in order to carry out the purposes thereof, while it is not necessary to include tips as wages in order to carry out the purposes of the Fair Labor Standards Act.

Lloyd Casualty Co. v. Merodith, 63 S. W. (2d) 1051;
Penn v. Spiers and Pond, Ltd., 1 King's Bench Law Reports 766, l. c. 769.

VII.

Respondent's argument that the tips received by the redcaps were its property is based on its contention that the tips were its charges to the donors thereof for services rendered them by the respondent through the redcaps. The tips cannot be considered charges made by the respondent since they are not uniform in amount, and no tariff authorizing the respondent to receive the same has been filed with the Interstate Commerce Commission, and the charge would be unlawful under Sections 2 and 6, Paragraph 7 of the Interstate Commerce Act.

Title 49, U. S. C. A., Sections 2 and 6, Paragraph 7;
Stopher v. Cincinnati Union Terminal Company, Inc., Case No. 28,495, decided by the Interstate Commerce Commission June 25, 1941.

VIII.

Since Section 6 of the Fair Labor Standards Act requires the minimum wages to be paid by the employer, the employee may not by contract waive his rights under the act and agree that his wages may be paid by tips which are his own property.

City of Glendale v. Coquat, 52 Pac. (2d) 1178;
Larsen v. Rice, 100 Washington 642, 171 Pac. 1037;
Holden v. Hardy, 169 U. S. 366, 397.

ARGUMENT.

I.

ON THE QUESTION OF THE OWNERSHIP OF THE TIPS IN THE ABSENCE OF AN AGREEMENT.

The Tips Received by the Redcaps in the Absence of a Contract Between Them and Respondent Providing That the Tips Would Be the Property of Respondent Were the Property of the Redcaps. The Fair Labor Standards Act Did Not Affect the Ownership of the Tips so as to Make Them the Property of Respondent.

The Circuit Court of Appeals for the Fifth Circuit in deciding this case and the case of Williams et al. v. Jacksonville Terminal Company, 118 F. (2d) 324, in which the principal opinion was written, ignored the accounting and guarantee plan almost entirely, holding that no consent of the redcaps was necessary to make the tips received by them the property of the terminal companies, since the tips were not gifts or gratuities, but were compensation for services performed by the companies through the redcaps, and hence the tips were the property of the companies irrespective of the consent of the redcaps. The Court further held in the case at bar (118 F. [2d], l. c. 328) that "The law had intervened to make the company owe them (the redcaps) a stated wage for those services, and in consequence to deprive them of the tips which previously were their compensation," and that even if there had been a collective agreement and the tips would belong to the redcaps, it "would not avail against changes wrought by a statute." The vital question is, as the Circuit Court of Appeals said in the Williams case (118 F. [2d], l. c. 215), "Whose money were the tips?"

Judge Holmes in his dissenting opinions in these cases

held, in effect, that the word "tip" should be given its usual and ordinary meaning, that of a gift or gratuity, and that being gifts or gratuities, the redcaps had the right to retain the tips for themselves. He was of the opinion that tips were not compensation for service, but rather, gifts or gratuities, because whatever moral compulsion one may have been under to tip redcaps, pullman porters, or other employees, there was no legal obligation to do so during the period involved. He agreed with District Judge Atwell, who had rendered judgment in favor of the redcaps in the Dallas case, that (33 F. Supp. 247):

> "The payment of tips by the public, to the employee of another, is a gift to that employee, and in the absence of any contract between the employee and employer that such tips shall be the property of the employer, they remain the property of the employee."

Judge Merrill E. Otis in the case of Harrison v. Kansas City Terminal Railway Company, 36 F. Supp. 434, l. c. 439, also agreed with the contention of the plaintiff in that case that in the absence of an agreement on the part of an employee to turn over his tips to his employer, tips received by the employee are the property of the employee. He decided against the redcaps in that case, however, refusing to follow the opinion of Judge Atwell in the case at bar saying that it was distinguishable on the facts from the Kansas City case. The difference in the two cases was that in the case at bar the redcaps protested against the accounting and guarantee arrangement and did not agree to the terms thereof, so that the trial judge found that there was no meeting of the minds on the terms of the accounting and guarantee notice, while in the Kansas City case there was no protest against the plan, and no question about its having been accepted by the redcaps.

The dissenting opinions of Judge Holmes, the opinion of Judge Atwell and the opinion of Judge Otis followed the

only previously reported cases which hold that, in the absence of an agreement, tips given by customers to an employee belong to the employee. These cases are collected in a note in 13 A. L. R. 924:

> "The only cases which have been found on the question whether tips given by customers to an employee belong to him, or his employer, hold that the employee is entitled thereto. Thus in Polites v. Barlin (1912), 149 Ky. 376, 41 L. R. A. (N. S.) 1217, 149 S. W. 828, it was held that an employee who, under a mistake as to his rights, turned over to his employer the tips given him by customers for his personal use, might compel the employer to return them to him.
>
> "And in Zappas v. Roumeliote (1912), 156 Iowa 709, 137 N. W. 935, it was held that a minor working in a shoe-shining emporium under a salary contract was entitled to the tips which were personal gifts to him from the patrons of the house, in the absence of a contract that they should belong to his employer, and that he could recover them back when paid to the employer by mistake.
>
> "In M'Rae v. M'Beath (1847), 5 N. B. 446, a stagecoach driver, and not his master, was held entitled to money given to the driver by the owner of a horse which was led behind the coach on one of its trips, the money being regarded as a mere gratuity to the driver for his trouble in looking after the horse."

The Iowa Supreme Court in the Zappas case, supra, said:

> "We think the Court was right in instructing that plaintiff would be entitled to any gifts in the way of tips over and above the regular charge for the service performed, given to him by patrons of defendant's place; and that **the burden of proof was on the defendant to show an agreement on the part of plaintiff to turn the tips over to him.**" (Emphasis ours.)

In the case of M'Rae v. M'Beath, supra, decided by the Supreme Court of New Brunswick, a stagecoach driver

sued his employer for wages due him. The defendant attempted to set off a gratuity given the driver by the owner of a horse which was led behind the coach on one of its trips. The Court held that the trial court had not erred in instructing the jury "that the plaintiff was not bound to account to the defendant for the money received for taking care of the horse which was led behind the stage, which might be considered as a mere gratuity from the owner of the horse." The defendant argued that whatever profit the employee derived from the employment belonged to the master, but the Court refused to adopt this view.

It will thus be seen that the majority opinions of the Circuit Court of Appeals in the Jacksonville and Dallas cases are in conflict with the previously decided cases holding that tips are the property of an employee in the absence of a contrary agreement.

The majority opinions in the Jacksonville and Dallas cases proceed on the theory that since the tips would not have been given the redcaps unless they performed a service for the donors, the tips are essentially compensation for services rendered by the terminal companies through the redcaps and not gifts, and hence are the property of the terminal companies. Judge Holmes, dissenting, however, takes the position that the tips were gifts since there was no legal obligation to tip at all. The majority opinions ignore the fact that in the case of every gift there is in a non-legal sense a consideration, that is, a reason for its being made, whether it be love, affection, a past favor, or a desire on the part of the donor to favor the donee, but it is the absence of a **legal** consideration which the courts have in mind when they say a gift implies want of consideration. The courts have held that a tip is a gift or gratuity not founded on any legal consideration. Thus, in Booker

v. Pennsylvania Railroad, 82 Pa. Super. 588, the Court said:

> "The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which he was not bound to give, and which the porter could not have recovered in an action of assumpsit if the passenger had not seen fit to give it."

And in Powers' Case, 275 Mass. 515, 176 N. E. 621, the Court said:

> "As to each customer of the employer, the tip to the employee was a gift, and not founded on an obligation."

We believe Judge Sibley, in writing the majority opinion of the Circuit Court of Appeals in the case at bar, avoided the accounting and guarantee notice almost entirely because, after recognizing that the tips belonged to the redcaps before October 24, 1938, if he should base respondent's title to the tips on the accounting and guarantee notice, he would have to find some act of the redcaps by which they agreed to transfer the tips from themselves to respondent. This he apparently could not do in view of the trial court's finding that there was no meeting of the minds of the parties on the terms of the notice (R. 277, 280, 288; 33 F. Supp., l. c. 248). He therefore found it necessary to rest his decision solely on the effect of the Fair Labor Standards Act itself and not on any consent of the redcaps. He therefore said (R. 302, 118 F. [2d], l. c. 328):

> "The law had intervened to make the company owe them a stated wage for those services, and in consequence, to deprive them of the tips which previously were their compensation. * * * a collective agreement would not avail against changes wrought by a statute."

We believe this conclusion to be unsound. There is no provision in the act which purports, or which by necessary operation serves, to deprive any employee of property which he would otherwise own. If tips were the property of the redcaps before the Act, the Act alone could not make them the property of the terminal companies. The Circuit Court of Appeals relied on the fact that the Act imposed on the terminal companies a duty to pay for services rendered, and that the tips received by the redcaps were compensation for those very services. But the duty imposed by the Act upon the terminal companies to pay wages to the redcaps was not discharged by permitting the redcaps to retain the tips they received from passengers unless the tips were the property of the terminal companies. The Circuit Court of Appeals in the Williams case recognized this when it said (118 F. [2d], l. c. 327): "The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds." The mere serving of the accounting and guarantee notices by the companies did not make the tips their property where the passengers intended the tips to be the property of the redcaps, and where there was nothing in the notice effecting any change in the ownership of the tips. The accounting and guarantee notice, even if agreed to by the redcaps, could not have prevented the tips when given from becoming the property of the redcaps in the first instance, for the passengers who gave the tips were not made aware of the agreement, and consequently, still intended their gratuities to belong to the redcaps. It is common knowledge that the public gives tips to redcaps as gratuities to them, and not as compensation to the terminal companies. Accordingly, when given to the redcaps, the tip money became their property. Since the tips became the property of the redcaps when given, the accounting and guarantee system amounted at most to an

agreement whereby the redcaps turned over some of their own property to their employer and received that property back from that employer as wages. That is not, we submit, a compliance with the Act. The Act requires the actual payment of a minimum wage, not an agreement that the employer will pay the minimum wage provided the employee gives to the employer, not only his services, but some of his property as well.

We submit, therefore, that the holding of the Circuit Court of Appeals for the Fifth Circuit in the case at bar and in the Williams case that the tips were the property of the terminal companies without the consent of the redcaps, and that no contract was necessary to make them such, is in conflict with the previously adjudicated cases holding that tips are the property of the employee in the absence of an agreement on his part to turn them over to the employer, and that the holding of the Circuit Court of Appeals attributing to the Act the legal effect of changing the ownership of tips from the redcaps to respondent is manifestly unsound and should not be followed.

II.

ON THE QUESTION OF WHETHER THE ACCOUNTING AND GUARANTEE NOTICE BECAME A PART OF THE EMPLOYMENT CONTRACT OF THE REDCAPS.

The Notices Served by Respondent on the Redcaps on October 22, 1938, Did Not Become a Part of the Employment Contract of the Redcaps Because They Protested Against the Proposed Arrangement, and Did Not Accept the Terms of Said Notice, and Because Respondent Could Not Effect a Change in the Working Conditions of the Redcaps by Unilateral Action in View of the Redcaps' Designation of a Representative for Collective Bargaining Purposes, and Their Request for a Conference to Negotiate a Collective Agreement Under the Provisions of the Railway Labor Act Without First Exerting Every Reasonable Effort to Make an Agreement with Said Representative.

The trial court held that the notice of October 22, 1938, delivered by respondent to each of the redcaps employed by it, notifying them that effective October 24, 1938, they would be required to report the tips received by them, and that respondent would guarantee to pay them the difference between the tips reported and the minimum wages provided for by the Fair Labor Standards Act of 1938, did not effect any change in the agreement under which the redcaps had for many years been working, and had been retaining all tips which they received. The court's conclusion was based on its finding of fact No. 4 (R. 280), reading as follows:

> "I find that the redcaps and their employer made no other contract on October 22, 1938, and have not made any since then. That neither the redcaps nor their employer saw fit to sever their former connec-

tions upon the expression of the views of each, as to the applicability of the Fair Labor Standards Act of 1938. That notwithstanding the expression of such views they continued to function together, and continued to recognize that the question of tips and wages was an open one between them."

Respondent criticizes the Court's holding, saying that by continuing to work for respondent, reporting their tips and accepting checks for the small differences between the tips reported and the minimum wages, the redcaps must be conclusively held to have accepted the terms of employment offered by respondent, even though petitioner, as their representative, protested against the proposed arrangement by his letter to respondent dated October 24, 1938. Respondent in its brief filed in the Circuit Court of Appeals cited as authority for its position Shuppan v. Peoria Terminal Railway Company, 30 Fed. (2d) 569, and L. C. Balfour Company v. Brown, 110 S. W. (2d) 104. There are, however, as the trial court observed, important factual differences between these cases and the case at bar, as we shall show, so that said cases are not in point here.

The record shows that for more than thirteen years the redcaps were employed by respondent at its union passenger depot in Dallas, receiving no wages from respondent, but depending solely on tips or gratuities of the passengers whom they served. On September 29, 1938, the Interstate Commerce Commission, acting under authority conferred upon it by Section 1, fifth, of the Railway Labor Act, as amended, in a proceeding instituted before it, known as Ex Parte 72 (Sub-No. 1), held that redcaps at stations in cities of over one hundred thousand population were employees for the purposes of the Railway Labor Act (R. 194). Respondent was notified of this proceeding and filed therein its answer to the questionnaire submitted to it,

in which it denied that the redcaps were its employees (R. 171).

Thereafter, on October 11, 1938, all of the redcaps involved in this action executed and delivered to respondent an instrument whereby they designated the Union Terminal System Board of Adjustment of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees as their duly authorized and accredited representative for the purposes set out in the several sections of the Railway Labor Act of 1934, as amended, and authorized said organization to enter into negotiations with respondent for the purpose of making a working agreement covering their conditions of employment, and to do any and all other things in connection therewith that would have for its purpose the making and maintenance of an agreement between respondent and said redcaps (R. 189). On the same date petitioner herein, being General Chairman of said Union Terminal System Board of Adjustment of the brotherhood, wrote Mr. Murrell L. Buckner, respondent's Vice-President and General Manager (R. 142), advising him of the ruling of the Interstate Commerce Commission holding that the redcaps were employees for the purposes of the Railway Labor Act, and of the fact that the redcaps had authorized the Union Terminal System Board of Adjustment of the brotherhood to represent them in the making of a working agreement as contemplated by the Railway Labor Act, and that they were, therefore, serving notice upon respondent of the action of the employees, and were advising the respondent that they were prepared to exhibit to it the authorizations they held executed by the redcaps, **and were asking for a conference under the terms of the Railway Labor Act** for the following purposes: (1) to exhibit to respondent the authorizations executed by the employees authorizing said Board of Adjustment to act for the redcaps, and (2) **for**

the purpose of negotiating an agreement covering their working conditions and other related subjects. This letter concluded with a request that petitioner be advised of the time, date, and place that would be agreeable to respondent to hold a conference for the aforesaid purposes.

After the redcaps had designated the Union Terminal System Board of Adjustment as their representative for the purposes of the Railway Labor Act, and petitioner as Chairman thereof had requested a conference for the purpose of negotiating an agreement covering working conditions and other related subjects, it then became the duty of respondent to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes in conference between its representatives and the redcaps' representative under Section 2 of the Railway Labor Act. It was mandatory that respondent do so under the provisions of the first and second paragraphs of Section 2 of the Railway Labor Act (45 U. S. C. A., Section 152), which reads as follows:

> "First. Duty of carriers and employees to settle disputes.
>
> "It shall be the duty of all carriers, their officers, agents, and employees **to exert every reasonable effort to make** and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof. (Emphasis ours.)
>
> "Second. Consideration of disputes by representatives.
>
> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference be-

tween representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

This duty was imposed on respondent as a carrier in order to carry out the purpose of the Railway Labor Act to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules or working conditions, so as to avoid any interruption to commerce, or the operation of any carrier engaged therein. Virginian Railway Company v. System Federation No. 40, 57 S. Ct. 592, 300 U. S. 515, 81 L. Ed. 789.

Under this section of the Railway Labor Act it was the duty of respondent, since the redcaps had selected and designated a bargaining representative and had so informed respondent, and had requested a conference for the purpose of making an agreement with respect to wages and working conditions, "to exert every reasonable effort to make * * *" an agreement "covering rates of pay, rules and working conditions," and respondent was without authority to take unilateral action to prescribe wages and working conditions until such efforts as required by the act had been made. In the Virginian Railway Case, supra, the Supreme Court held squarely that it was the mandatory duty of a carrier-employer to treat with the duly selected and authorized representative of the employees for the purpose of making, if possible, a collectively bargained agreement. After the redcaps had selected a representative for the purpose of collective bargaining and had notified respondent of their desire for a conference for the purpose of negotiating an agreement under the Railway Labor Act, respondent had no choice in the matter and was bound to treat with the men's designated representative. Under the Railway Labor Act it then became the clear, plain and inescapable duty of respondent to "exert every reasonable effort" to make an agreement

"concerning rates of pay, rules and working conditions." Instead of pursuing the course commanded by the act, it flouted the act and undertook by unilateral declaration to prescribe wages and working conditions. This it had no right to do for this plain reason: Implicit in the language prescribing the duty to exert every reasonable effort to negotiate an agreement with respect to wages and working conditions is the denial of the right of the carrier-employer to fix them by unilateral declaration.

After being advised on October 11, 1938, of the men's designation of a representative for collective bargaining purposes and of the men's desire for a conference, respondent undertook to deal with the redcaps individually by serving on each of them eleven days later the notice of October 22, 1938, by which respondent sought to change the existing arrangement under which the redcaps retained their tips by requiring that so much of said tips be applied against the minimum wage which respondent realized it was required to pay these men as employees under the Fair Labor Standards Act of 1938. In so doing it ignored the men's request for a conference for the purpose of negotiating an agreement covering working conditions and other related subjects, and ignored their duly designated representative so far as this desired change in the arrangement under which they had been working was concerned. There was a day when a carrier could by its own fiat dictate wages and working conditions without negotiating with the employees, **but that day ended with the enactment of the Railway Labor Act.** As a matter of fact, the Railroad Labor Board, created by the Railroad Labor Board Act of 1920 (41 Stat. 469) in its decision No. 119, reported in Decisions of the United States Railroad Labor Board, Volume II, page 87, in ordering certain carriers and representatives of their employees to confer in an effort to agree on rules and working conditions, laid down sixteen prin-

ciples with which the rules agreed upon should be consistent (l. c. 95, 96), among which was the following:

> "7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with if and when the representatives of a majority of the employes of each of the several classes directly affected shall have conferred with the management."

This principle was referred to by Judge Hutcheson, who was then sitting in the District Court for the Southern District of Texas, and is now a member of the Circuit Court of Appeals for the Fifth Circuit, in the case of Brotherhood of Railway and Steamship Clerks etc. v. Texas and New Orleans Railroad Company, 24 F. (2d) 426, thereafter affirmed by this Court on certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, 281 U. S. 548, 74 L. Ed. 1034.

So much for the conduct of the respondent. Let us now consider the conduct of the employees. It must be remembered that they were by command of the Railway Labor Act under the obligation to exert every reasonable effort to make an agreement by negotiation with respondent. They were, in other words, commanded when wages and working conditions were to be considered, or a dispute arose, to stick to their posts, permit the stream of commerce to flow, and negotiate. Recognizing that duty, they selected their negotiator, so advised respondent and invited negotiations, as we have heretofore pointed out.

When respondent served its notice of October 22, 1938, on the individual redcaps (instead of pursuing the course commanded by law), the employees turned the whole matter over to their previously authorized representative, and replied through him—thus conclusively asserting their

willingness and readiness to deal through him as their collective bargaining agent. The representative filed a protest against the action of respondent.

This left the action of respondent unagreed to. There was, as Judge Atwell found, no meeting of the minds. The situation then was in this posture: The employees stood ready and willing to negotiate—urging negotiation in fact. Respondent stood on its unilateral declaration and failed to make any reasonable effort to make an agreement. The employees continued in their jobs, as it was their duty to do, all the while keeping their protest alive and likewise their readiness and willingness to negotiate. They preserved peace in the industry by complying with the demand of respondent for reports of tips received. They accepted payment of part of their wages from respondent, to which they were clearly entitled under the law. Meanwhile, as we have said, they kept their protest and invitation to negotiate alive. There is nothing in all this which can be construed as an acceptance of the accounting and guarantee notice by the redcaps.

Respondent may say that we are relying on Paragraph Seventh of Section 2 of the Railway Labor Act (Par. 7, Sec. 152, Title 45, U. S. Code), which provides that no carrier shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements, except in the manner prescribed in such agreements, or in Section 6 of the Act. We are not, however, relying on this section, as it is designed to protect agreements and conditions established after collective agreements are made. We are here dealing with provisions of the law prescribing the duties of carriers and their employees in the **making** of agreements. Respondent's confusion arises from the failure to recognize the two functions of the Railway Labor Act, which are: (a) to regulate and supervise the **making** of agreements, and (b) to protect and maintain them **after they are made**. Both func-

tions have the same purposes—as declared in the first section of the Act: "(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (3) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

The first six Paragraphs of Section 2 of the Railway Labor Act (Sec. 152, Title 45, U. S. Code) embody provisions dealing with the **making** of agreements. They command every reasonable effort to **make** agreements. They safeguard the employees in organizing and selecting representatives. They proscribe attempts of the employers to influence or coerce employees in the exercise of these rights.

And here let us say that there could be few more effective ways for an employer to coerce employees into abandoning their organization or their representative than by committing such acts as respondent committed in this case. A carrier, when confronted with negotiations, could easily take such unilateral action as would place the employees at a great disadvantage in their efforts to bargain collectively. Upon these considerations who can deny that it was the clear intent of the Railway Labor Act that wages and working conditions can be changed by an employer only after he has fully complied with the law, and has made every reasonable effort to make an agreement by negotiation with the duly authorized representative of the men. The language of Mr. Justice Swayne in Smythe v. Fiske, 23 Wall. 374, 380, is especially applicable here:

> "A thing may be within the letter of the statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law."

The intent of the law-maker, as set forth in the first section of the Railway Labor Act, was to enact a law which would tend to prevent labor controversies and interruptions of commerce. With that intent in mind, who can say that it would not be sheer mockery to leave out of the law the denial of the right of an employer to fix wages and working conditions without first exerting every reasonable effort to make an agreement with respect to them by negotiation with the employees?

Although respondent thus ignored the requirements of the Railway Labor Act, it did recognize by its conduct thereafter that the redcaps had not agreed to the terms of its accounting and guarantee notice, and that the question of whether tips could be considered wages was still unsettled. As Judge Atwell observed in his opinion, the respondent on December 16, 1939, recognized that this question was still an open one between it and the redcaps when Mr. Buckner, its Vice-President and General Manager, addressed the following letter to petitioner (R. 153):

"Dear Mr. Pickett:

"Referring to our conversation and letter which you showed me from Mr. Harrison in reference to the Kansas City Terminal agreement with the Redcaps.

"I have carefully read this agreement and I see nothing in it that is in any way out of line, except that Rule 6 would not apply to this property and Rule 17 is not clear.

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the Court **and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union, of which you are the General Chairman for this Company.** (Emphasis ours.)

"Very truly yours,

(Signed) Murrell L. Buckner."

Thereafter a working agreement was entered into between respondent and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, as representative of the redcaps, effective January 1, 1940, in which the question as to whether the redcaps were entitled to be paid a wage in addition to the tips they received was not dealt with, but in which it was recognized that the question as to whether respondent was required to pay a wage in addition to tips was to be determined by the courts. This agreement provided that a redcap who was dismissed or suspended was entitled to a hearing on the charges preferred against him, and that if the charges were not sustained, he should be reinstated. Rule 16 of the agreement so providing contained the following provision (R. 134):

> "The employee shall be reimbursed for any money losses suffered; provided that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act' the carrier is required to pay a wage to the redcap over and above any amounts that may be received by them as tips. (Note.) This rule shall not be construed as requiring the carrier to reimburse redcaps for loss of tips, either now or in the future."

The record shows that after the redcaps had protested against the arrangement proposed by respondent in its notices of October 22, 1938, conferences were held between Mr. Buckner, petitioner and a committee of redcaps in an effort to arrive at a basis for a working agreement between the respondent and the redcaps, but that no effort was made to agree on the question as to whether respondent was entitled to treat tips as wages paid by respondent. During these conferences the men always insisted on their rights under the Fair Labor Standards Act, and at no time withdrew their protests against respondent's proposal contained in the notice of October 22, 1938 (R. 198, 206). Mr. Buckner, respondent's vice-president and gen-

eral manager, who was representing respondent in these conferences, understood the position of the men, but apparently was of the opinion that the railroads were entitled to credit tips against the minimum wages prescribed in the Fair Labor Standards Act, even though there was no agreement between respondent and the men to that effect. Respondent still so contends. Mr. Buckner, therefore, when he wrote petitioner on December 6, 1939, called the latter's attention to the fact that a case was already in court involving the question as to whether the railroads were entitled to credit tips against wages, and that he would be glad to negotiate an agreement with the Clerks' Union when this question was decided. He apparently felt that this question, that is, as to whether tips were wages as a matter of law aside from any agreement of the parties, would have to be decided by the Courts before he could negotiate on the wage question. The statement in Mr. Buckner's letter that "As soon as same is decided we will be glad to negotiate an agreement" is clearly an admission on the part of Mr. Buckner that no agreement had been made between respondent and the redcaps to the date of said letter, for if Mr. Buckner thought that an agreement had been made he would likely have said: "We cannot negotiate on the question as to whether we are entitled to credit tips against wages because the company and the redcaps have already agreed to the terms of the notice served by the company on October 22, 1938, and, therefore, the question is settled." Mr. Buckner did not, however, write petitioner to that effect because he undoubtedly realized that no agreement had been reached in view of petitioner's protest against the company's proposal of October 22, 1938, and the redcaps continued insistence through their representatives that they were entitled to a wage in addition to tips received.

An agreement was, however, finally consummated, effec-

tive January 1, 1940, in which the tips-wage question was not dealt with at all, but was left open awaiting a decision of the Courts, as is evidenced by the provision in Rule 16 providing that if a redcap was improperly dismissed or suspended, and after a hearing was reinstated, he would be reimbursed for money losses suffered, if it was subsequently determined that under the provisions of the Fair Labor Standards Act respondent was required to pay a wage to the redcaps over and above any amounts that they might receive as tips (R. 134). Of course, since there was no agreement between the parties on the notice of October 22, 1938, in the event of a holding by the Courts that absent an agreement tips could not be credited against wages, respondent would be bound to pay the men at the rate prescribed in the act for all time they worked for respondent, but as there might be some question about their right to be reimbursed at said rate for lost time in the event they were reinstated after being improperly dismissed or suspended, Rule 16 was inserted in the agreement to cover this point. Is it reasonable to suppose that the respondent, if it thought that an agreement had been made between it and the men on the terms of the notice of October 22, 1938, would not have insisted that this alleged agreement be incorporated in the written agreement, especially in view of the protest made by the men to the arrangement on October 24, 1938? It was not embodied therein, however, as Mr. Buckner accepted the men's protest against the arrangement as being a rejection thereof by them, and proceeded on the theory that no agreement had been made, but that the company was nevertheless under the law entitled to credit tips against wages even without an agreement.

This is an important respect in which the facts here differ from the facts in the two cases cited by respondent. Shuppan v. Peoria Railway Terminal Company, 30 Fed.

(2d) 569, and L. G. Balfour Company v. Brown, 110 S. W. (2d) 104. In neither of those cases was there any conduct on the part of the employers from which it might be inferred that they accepted the protest made by the employees therein involved as keeping the changes which the employers therein sought to make in the working agreements open for further determination by the Courts. Thus, in the L. G. Balfour Company case, the Court, after quoting plaintiff's letter, which it termed a protest, but which actually was merely a request of the defendant that it allow the same bonus on plaintiff's sales as on salesmen's sales, said that after this letter was written, "In so far as the record shows the **dispute ended there.**" There was no recognition by defendant that any question as to plaintiff's compensation remained open for later settlement as in the case at bar.

So, too, in the Shuppan case, although the employees protested against the proposed reduction in their wages, the company at no time conceded by its conduct or otherwise, that the question was open for further discussion or for the decision of any Court.

Respondent now says that the redcaps had only two alternatives upon being served with the notice of October 22, 1938. They could either accept the terms thereof, or they could leave respondent's employ. We submit that there were several other alternatives, that is, the men could have exercised their right to strike, or could have attempted to settle their differences by negotiation under the terms of the Railway Labor Act, or could have left the question of respondent's right to offset tips against wages open to be determined by a decision of the courts. Respondent had no right to effect a change in rates of pay, rules or working conditions of these men as they existed on and prior to October 22, 1938, without first exerting very reasonable effort to reach an agreement with the men as required by

the Railway Labor Act. It was its mandatory duty under the Railway Labor Act to exert every reasonable effort to settle this dispute in conference between its representative and the representative designated by the men. Until it had in good faith followed the procedure prescribed in the Railway Labor Act, it had no right to attempt to change the working conditions by serving individual notices on the men and treating with them individually. Such action on its part was contrary to both the letter and spirit of the Railway Labor Act.

It is true that this Court, in the case of Virginian Railway Company v. System Federation No. 40, 300 U. S. 515, 81 L. Ed. 789, wherein it held that the carrier might by mandatory injunction be compelled to treat with the duly designated representative of a majority of its employees in a particular craft or class, said that the Railway Labor Act did not preclude such individual contracts as the carrier might elect to make directly with his individual employees. We submit, however, that all the Court meant by this statement was that a carrier is not bound to make any collective agreement, although it is bound in good faith to exert every reasonable effort to do so, and that it may enter into individual contracts with such of its employees as desire to bargain individually rather than collectively. The Court did not say a carrier could, where his employees have designated a representative for collective bargaining purposes under the Railway Labor Act, and said representative has requested a conference for the purpose of negotiating an agreement covering working conditions, ignore such action of the employees, and their expressed desire to bargain collectively, and attempt to effect a change in the working conditions of such employees by serving a notice on them individually, as was done in this case. If a carrier can thus ignore the requirements of the Railway Labor Act, and affect the rates of pay and working

conditions of its employees after they have designated a representative for collective bargaining purposes, and have expressed their desire to deal collectively, by serving notices on those employees who desire to deal collectively rather than individually, it is apparent that the Railway Labor Act will have failed in its purpose.

We find nothing in the case of Illinois Central Railroad Company v. Moore, 112 F. (2d) 951, decided by the Circuit Court of Appeals for the Fifth Circuit and relied on by respondent, which justifies respondent's conduct in attempting to change the working conditions of the redcaps by the service of notices on the individual employees after they had designated a representative for collective bargaining purposes, and a conference for the negotiation of an agreement had been requested. As we understand this case, it merely holds that where there is a collective agreement between a union and a carrier, it is not itself a contract of employment, but is only a basis agreed upon as mutually satisfactory for making contracts of employment. The Court said that in the absence of any special agreement otherwise, every employment may be presumed to be on the basis of a collective agreement and to adopt its terms, but that ordinarily there is nothing to prevent a special agreement, **if an employee desires it.** That is exactly our position here. All we contend is that under the Railway Labor Act an employer must exert every reasonable effort to make a collective bargaining agreement where its employees have designated a representative for that purpose, and have expressed their desire to deal collectively. We do not contend that an employer may not deal individually with those employees **who desire to deal individually.**

Respondent lays great stress on the fact that after it served the notices on the redcaps on October 22, 1938,

the redcaps reported their tips and accepted checks which it gave them for the differences between the minimum wages earned and the tips reported, claiming that this conduct on the part of the redcaps is conclusive as to their acceptance of the terms of the notice. The fact that the men reported their tips during the periods from October 24, 1938, through February 28, 1939, and from October 16, 1939, to the date of the filing of this suit, does not mean that in so doing they were agreeing to respondent's so-called accounting and guarantee arrangement. Furthermore, it cannot be said that in accepting checks for the differences between their tips and the minimum wage they agreed to the arrangement, because one may accept part of what is due him without impairing his right to collect the balance. Even if the reporting of tips and the acceptance of these checks from respondent might ordinarily be considered as evidence of the men's assent to the accounting and guarantee plan, the Court should not so find in a case where the parties are subject to the provisions of the Railway Labor Act because it is clear that it is the policy and purpose of that Act that employees not leave their employment and go out on strikes just because there may be a dispute between them and their employer, but rather that they remain on the job and attempt to settle their differences amicably. This was what both parties finally determined to do by leaving the question open for a decision by the courts, and with this understanding the redcaps remained in the employ of appellant. The fact that respondent kept a record of the tips, and paid the redcaps the difference between the tips and the minimum wage, is no evidence that respondent considered the accounting and guarantee plan in effect, because it has always been its position that tips are wages irrespective of agreement, and even on this theory it would owe the redcaps the difference between the tips and the minimum wages,

and it could not pay this difference without having the men report the amount of tips received by them.

On January 11, 1941, Judge Merrill E. Otis, sitting in the District Court of the United States for the Western District of Missouri, held against the redcaps employed at the Kansas City Union Station in a case somewhat similar to the case at bar, entitled, "George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, as representative of C. M. Barngrover et al., plaintiff, v. Kansas City Terminal Railway Company, a corporation, defendant," 36 F. Supp. 434, on the theory that they had accepted the terms of a notice served on them identical in form with the notice in this case. There was this important difference in the case, however, that the redcaps there made no protest whatsoever against the proposed accounting and guarantee plan such as the protest made by petitioner in this case by his letter of October 24, 1938. In referring to this case, Judge Otis noted this difference, saying:

> "A similar question **(but with facts differing in a material respect)** was presented to the District Court for the Northern District of Texas and decided by that court May 28, 1940, Pickett et al. v. Union Terminal Co., 33 F. Supp. 244." (Emphasis ours.)

We submit, therefore, that the accounting and guarantee notice did not become a part of the employment contract of the redcaps, both because there was never any meeting of the minds of the parties thereon, and because respondent could not by such unilateral action on its part effect a change in the existing employment contract without first exerting every reasonable effort to reach an agreement with the petitioner as the redcaps' representative as required by the Railway Labor Act.

III.

ON THE QUESTION AS TO WHETHER THE ACCOUNTING AND GUARANTEE NOTICE EFFECTED ANY CHANGE IN THE OWNERSHIP OF THE TIPS.

The Accounting and Guarantee Notice of October 22, 1938, Did Not Effect Any Change in the Ownership of the Tips Received by the Redcaps After That Date so as to Make Them the Property of Respondent, Which Could Be Used by Respondent to Pay Wages to the Redcaps.

We believe we have shown under point II, supra, that respondent's notice of October 22, 1938, referred to as the accounting and guarantee notice, did not become a part of the employment contract of the redcaps. But even if the Court should disagree with us on this point, we submit that the notice did not effect any change in the ownership of the tips, so that they became the property of respondent, and it might be said that respondent, by permitting the redcaps to retain the tips, was thereby paying the redcaps wages with its own money.

For the convenience of the Court we here set forth respondent's notice of October 22, 1938, omitting the address and signature:

> "In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the Station Master the amounts received by you as tips or remuneration for such services.
>
> "The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensa-

tion which, together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required."

In substance, this notice simply amounts to a statement by respondent which might be phrased as follows:

"Under the Fair Labor Standards Act we are required to pay you a minimum wage. This wage will be paid you by passengers who give you tips. You will inform us as to the amount of these tips, and if the passengers do not pay you sufficient tips to secure the minimum wage, we will pay you the difference,"

or perhaps it might be stated as follows:

"You are privileged to retain your tips as you have always done, but with this difference: We will credit the amount of said tips against the minimum wage which the law requires us to pay you, and if you do not receive sufficient tips to secure the minimum wage, we will make up the difference."

There is nothing in the notice stating that the men must turn over their tips. On the contrary, the notice specifically states that the men are privileged to retain their tips. The only limitation, in effect, sought to be made on this privilege was that the men must consider these tips

as part payment of wages so that the respondent would only have to make up the difference between the tips and the minimum wage. The representative of the carriers so interpreted the notice in the hearing before the Wage and Hour Division in the matter of the amendment of the record-keeping regulations, to which we refer under point IV, when he said:

> "The only change it proposed to make from the one that had been in effect all the years before was simply to add the element of a guarantee to these men. These men had been working all the years, generally speaking, for the tips they could get. The change that was proposed was to let them continue to do that, but add the one additional element of a guaranty to them that if they didn't make the minimum required by the law, the railroad would make it up to them."

Thus, in the final analysis, the accounting and guarantee arrangement devised by the railroads to evade their liability under the Fair Labor Standards Act is an attempt by them to write into the act a provision under which tips received from passengers are to be considered as wages paid by the railroads. Respondent, of course, will say that this is not its effect, contending that the arrangement is tantamount to the turning over of tips by the men to the amount of the minimum wage. The notice does not, however, as we have pointed out, so provide. Stated briefly, the notice is to the effect that "the carrier * * * guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided (that is, as tips) will not be less than the minimum wage provided by law," and that the men are "privileged to retain, subject to their being credited on such guarantee, all such tips or remuneration * * * except such portion thereof as may be required * * * for taxes." There is

not a single word in the notice about the men turning over their tips. The notice merely states that the carrier guarantees that the amount of tips reported, plus the sum paid by the respondent, will not be less than the minimum wage. In other words, respondent was merely expressing its opinion and belief that tips are wages which could be considered as received in partial discharge of the minimum wage required to be paid by the act.

The clear mandate of the law is that every employer shall pay to every employee wages at a given minimum rate per hour. The accounting and guarantee notice is not an agreement to pay a wage of any sort whatsoever, except as to the small difference between the minimum wage and tips reported, nor is it a notice from which an agreement between the employer and the employees could be inferred that the tips received by the employees should become the property of the employer. The notice at no place states that the employer claims ownership of the tips or gratuities which the employees might receive, but simply requires them to report the tips to the employer. The notice is nothing more than a contract of guarantee. It merely states that the redcaps shall, as in the past, be privileged to retain as their own such tips or gratuities as they receive from the traveling public, and that the respondent, instead of agreeing to pay a wage in accordance with the mandate of the law, guarantees to the employees that they will receive for their time spent at respondent's station from patrons of the station an amount equal to the minimum wage prescribed by law, but that if they do not receive from the patrons of respondent's station such an amount, respondent guarantees to make up any difference there might be. In so doing respondent has merely said to the employee: "You will get your money from the patrons of our station, and we simply guarantee that that which you get will not be less than a certain amount."

Respondent will likely cite the case of Harrison v. Kansas City Terminal Railway Company, 36 F. Supp. 434, in which Judge Merrill E. Otis, sitting in the District Court for the Western District of Missouri, rejected our construction of the accounting and guarantee notice, holding that the notice was an assertion by the defendant therein of ownership of the redcaps' tips. In speaking of an identical notice in that case, Judge Otis said (36 F. Supp., l. c. 439):

> "None seriously would contend that the redcaps did not understand that the defendant intended that after October 21, 1938, tips should be counted in the calculation of minimum wages to be paid as required by the Fair Labor Standards Act."

We do not dispute this statement; in fact, it is the construction of the notice for which we are contending, that is, that the terminal company wanted to include tips as wages paid by defendant. Judge Otis then says (36 F. Supp., l. c. 439):

> "None seriously would contend that the redcaps did not understand that the defendant by its announcement asserted rights to and an interest in tips received. It did that when it required that such tips should be reported daily (no employer would require an employee to report gifts in which the employer had no interest). It did that when it specifically made it known that tips were to be included in compensation guaranteed. Especially did it do that when it advised the redcaps that they were 'privileged to retain * * * tips.' To grant a privilege is to assert the right to grant it."

We do, however, dispute these statements. It is not true that no employer would require an employee to report gifts in which the employer had no interest, as it was essential that the tips be reported even though the employer claimed no interest therein, since it was claiming

that they were wages, and that it was only bound by the act to pay the difference between the tips and the minimum wage. It could not pay this difference unless it was advised of the amount of the tips by the daily reports of the redcaps. The requirement that the tips be reported is not the assertion of a claim of ownership of the tips. Nor is the statement in the notice that the redcaps were "privileged to retain * * * tips" inconsistent with our construction of the notice, and consistent only with an assertion by the employer of ownership of the tips. The redcaps had for many years in all railroad stations of the nation been permitted to retain their tips; this permission was not an assertion of ownership of the tips by the railroad companies, but, on the contrary, was a recognition of the fact that the tips were given to the redcaps by the traveling public and were not given to the railroads, and that consequently the tips were always the property of the redcaps. The mere statement in the notice that this privilege of retaining tips was to continue did not affect the existing situation one bit so far as the ownership of the tips was concerned; the ownership remained as before, that is, in the redcaps. Judge Otis says that the notice was an assertion by the defendant therein of a claim it had a right to assert, a claim to the tips received by the redcaps. While we have great respect for Judge Otis, we confess we are unable to find anything in the notice where the defendant therein asserts any claim to the ownership of the tips.

We respectfully submit, therefore, that the accounting and guarantee notice did nothing more than attempt to set up a system of reporting of tips by the redcaps in order that the respondent might be advised of the amount of the difference, if any, between the minimum wages earned and the tips reported, so that it could pay this difference, and thereby comply with the act as construed by it, that is, that tips were wages which it was entitled to credit against the minimum wage, being liable only for the defi-

ciency, if any, and that there is nothing in the notice whereby the respondent asserted any ownership of the tips, and nothing in the notice whereby the ownership of the tips was affected. The ownership of the tips, therefore, remained where it had always been, in the redcaps.

IV.

ON THE QUESTION OF WHETHER THE ACCOUNTING AND GUARANTEE PLAN WAS A COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT.

Congress, in Using the Language "Every Employer Shall Pay to Each of His Employees Who Is Engaged in Commerce Wages" at Certain Rates, Expressed Its Intention That a Direct Wage Payment Should Be the Means of Carrying Out the Purposes of the Act. Its Purpose Will Be Defeated If the Accounting and Guarantee Plan Is Held to Be a Compliance With the Act.

Respondent in the Circuit Court of Appeals relied on the principle that in the interpretation of statutes the duty of the Court is to construe the language so as to give effect to the intent of the law-making body, and that by applying this rule to the Fair Labor Standards Act of 1938, it may be said that the purpose of Congress in enacting said act was to guarantee to every employee engaged in commerce certain minimum earnings which Congress thought were required for the maintenance of a minimum standard of living necessary for health, efficiency and general well-being of workers, and that this purpose is accomplished fully as well if an employee receives the minimum earnings from tips, instead of through a direct wage payment from his employer. We, of course, do not want to be understood as contending that 25 cents received in tips will not purchase as much as 25 cents re-

ceived in wages, but we do say that Congress had the right to say what means should be employed to carry out the purposes of the act, and that Congress has said, and for very good reasons, that the purposes of the act can best be accomplished by a direct wage payment from the employer to the employee.

The purpose of the act may best be found in Section 2 thereof (Title 29, U. S. C. A., Section 202), which reads as follows:

> "Sec. 2. Congressional finding and declaration of policy.
>
> "(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) **constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce**; and (5) interferes with the orderly and fair marketing of goods in commerce.
>
> "(b) It is hereby declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power." (Emphasis supplied.)

The labor conditions which bring about the evil results enumerated in subsection (a) of section 2, and which conditions Congress declared its purpose to eliminate are (a) low wages paid by certain employers, and (b) long hours

prevailing in certain employments. In this section Congress makes it clear that it considered wages below the minimum necessary to the maintenance of a decent standard of living an "unfair method of competition in commerce," and that this was one of the evil results which it intended to correct by the enactment of this measure. This purpose of Congress was recognized in the House Report on the Fair Labor Standards Act, being Report No. 1452, page 9, where the House Committee, to whom the bill was committed, said:

> "Collective bargaining efforts will be greatly strengthened by the power given to the Board to prevent competing chiseling employers from undercutting decent minimum wage standards or from stretching decent maximum hours standards."

Again, in its further report submitted April 21, 1938, being Report No. 2181, page 6, this Committee said:

> "No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee in any part of the United States in any industry affecting interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes."

Further, on page 7 of this report, in referring to section 2 of the committee amendment to the act, the report says:

> "Section 2 of the committee amendment contains a statement of the effect which the maintenance of substandard labor conditions exerts on interstate commerce. This finding is abundantly supported by the testimony of the joint hearings held on H. R. 7200 and S. 2475 during the first session of the Seventy-fifth Congress. The hearings indicate (1) that the maintenance of substandard labor conditions in a particular

industry by a few employers necessarily lowers the labor standards of the whole industry, and that this lowering of the standards is brought about by reason of the fact that the channels of interstate commerce have been open to goods produced under substandard labor conditions; (2) that the overwhelming majority of reputable employers consider competition in wages as an unfair and unconscionable method of competition in commerce; (3) that the maintenance of substandard labor conditions by the few employers referred to results in a downward spiral of wages in the industry with consequent dissatisfaction among employees in the industry which in turn results in labor disputes in the industry; and (4) that the States are unable to remedy the situation because goods which were produced under substandard labor conditions in one State may, protected by the failure of Congress to exercise its commerce power, flow freely into another State which attempts to maintain fair labor standards."

When all the evils which Congress endeavored to correct by the Fair Labor Standards Act are considered, it is easy to understand why Congress employed the particular language used in section 6:

> "**Every employer shall pay to each of his employees** who is engaged in commerce or in the production of goods for commerce **wages** at the following rates."

It is clear that Congress had in mind that in order to correct the evils listed as flowing from inadequate wages and excessively long hours, it was not only necessary to provide that each employee should receive for his services, an amount not less than that prescribed, but that such payment should be made by the employer in the form of wages. Congress did not mean to permit one employer to avail himself of the services of employees when paying such employees a wage below the standard prescribed, while his competitor in the same line of business was pay-

ing his employees the prescribed wage or more. To do this would, of course, defeat the act with respect to one of the things listed as an evil which the act was designed to correct.

The Court will take judicial notice of the fact that the "sweatshop" wages paid by employers in some sections of the country have heretofore disastrously affected wages and labor conditions in other sections. If an employer in one section can get free labor, he can sell his goods throughout the country at such a price as to force employers in competition to beat down wages, and thus bring on wage and hour controversies.

Congress expressly says that one of the evils it wished to correct by the enactment of this law was just that. It, therefore, says to employer A in Texas, "you must pay each of your employees in wages not less than a certain amount," and it says to employer B in Missouri, or some other state, the same thing. It says:

> "We recognize that to permit an employer to pay any employee wages less than a prescribed minimum, constitutes a method of unfair competition, and leads to countless labor controversies, and the resultant interference with commerce, and we, therefore, demand that each and every employer shall pay out of his funds, wages according to a certain standard."

From these conditions, it follows that to permit an employer to concoct any scheme or device through which he will get his work done for nothing, when an employer engaged in the same line of business pays the prescribed wage, constitutes an unfair method of competition and flies in the very teeth of this law.

That is exactly what the respondent in this case proposes to do. It has worked out a scheme through which it proposes to be relieved of the payment of practically any

wage whatsoever out of its funds, and to let other persons pay to its employees the amounts which the law requires should be paid by the employer itself.

The word "wage" has a definite well-understood meaning, that of a payment by an employer to an employee of compensation for work performed by the employee for the employer, and Congress must have used the word "wage" having in mind this meaning, and we submit that Congress did so in the exercise of its right to determine how the purposes of the act could best be effectuated; that Congress has said that they could best be effectuated by a wage payment made direct to the employee by the employer, rather than by a combination of tips from the public and wages from the employer, and that no court may say that the means laid down by Congress as most appropriate to the carrying out of its purpose may be disregarded.

We submit that when Congress said that every employer shall pay wages, Congress meant just this, no more and no less. It is true it might have said every employer shall pay wages, which, together with tips or gratuities received by the employee during the course of his employment, shall equal the minimum wage, but Congress did not see fit to do so, and we believe for very good and sufficient reasons. We believe that Congress in imposing the mandatory duty on the employer to pay the wage had in mind that this was the only way the law could be enforced without danger of evasion. We believe Congress by the language used intended to prohibit any such arrangements as the so-called accounting and guarantee plan in this case, which can so easily become the means of evading the obligations imposed by the act.

Sections 11 (a) and (c) of the act [29 U. S. C. A., Sections 211 (a) and (c)] are applicable here, and we therefore quote the pertinent parts thereof:

"Sec. 11. (a) The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. • • •

"(c) Every employer subject to any provision of this Act, or of any order issued under this Act, shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder."

It will be seen that section 11 (c) of the act requires the employer to keep such records of the persons employed by him, and of the wages, hours and other conditions and practices of employment maintained by him, as shall be necessary for the enforcement of the provisions of the act, and that section 11 (a) gives the Administrator power to investigate and gather data regarding the wages, hours and other conditions and practices of employment in any industry subject to the act, and gives the Administrator power for that purpose to inspect the records kept by the employer.

The so-called accounting and guarantee system is subject to serious abuse, a factor which is properly considered in determining whether Congress intended that such system

might fulfill the statutory purpose. The records which the employer is required to make and preserve under section 11 (c) of the act are essential in order to determine whether the act is being violated. Respondent required the redcaps to report the tips received by them, and adopted and relied upon such reports in determining whether it owed the redcaps anything on account of its guarantee. Under such a plan no provision is made for determining how much the employees actually received in tips. The redcap can report without effective check by the Administrator or the employer the receipt of any sum whatsoever. If he feels it necessary to report the receipt of tips equal to or nearly equal to the minimum wage because of the fear that he may otherwise lose his job as an inefficient employee, he can do so, even though he received much less. This scheme, therefore, permits easy evasion of the minimum wage provisions of the act, and the provisions requiring that true and accurate wage records be made and kept. It is true that the redcaps represented in this case by petitioner have agreed in the agreed statement of facts filed herein that each of them received in tips or in tips and wage payments by respondent an amount at least equal to the minimum wages prescribed by the act, but in determining whether Congress had in mind permitting any such plan as the accounting and guarantee plan, however, we should not be confined to a consideration of whether the act has been evaded in this particular case, but whether the accounting and guarantee plan so easily lends itself to evasion of the act that Congress cannot be said to have had it, or any similar arrangement, in mind when it enacted that **every employer should pay** certain minimum wages.

In the spring of 1939 petitions were filed with the Administrator of the Wage and Hour Division of the United States Department of Labor by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express

and Station Employees, and other parties representing redcaps throughout the country, for an amendment to part 516 of the regulations issued by the Administrator under authority of Section 11 (c) of the Fair Labor Standards Act of 1938. A hearing was held before Gustav Peck, presiding officer, who heard the interested parties. It was proposed by the Brotherhood of Railway and Steamship Clerks that an amendment of the regulations be made so that wages should not include tips or gratuities received by employees of employers specified in section 13 (b) of the act from passengers or persons other than the employer. The Administrator decided that he did not have authority to make the amendment proposed, since he felt that the matter of whether tips were wages under the act was a matter to be determined by the courts, but he did amend the record-keeping regulations by requiring that a separate record be kept of wages paid by the employer, and of tips received by the employees. It appears from the findings and recommendations of the presiding officer at the hearing that careful consideration was given to the accounting and guarantee arrangement adopted by the carriers. We quote from the findings and recommendations of the presiding officer (4 Fed. Reg. 4252):

> "When the Fair Labor Standards Act was enacted, the carriers, according to their testimony, gave serious consideration to the problems raised by the Act to determine 'whether they could devise any way to avoid having saddled upon them an additional cost of operation of upwards of two million dollars per year' (365). While redcaps were admittedly their employees, they did not feel impelled to pay them 25 cents per hour out of pay roll funds. Instead the carriers instituted the 'accounting and guarantee' arrangement which they believed would meet the requirements of the law. Under this arrangement, each redcap is requested to report the amount of tips received every day. There is no change in the method

of compensation of redcaps; but if the total amount received from the public is less than 25 cents per hour the carrier agrees to make up the difference.

"This arrangement was designed to avoid as far as possible any payment to redcaps from the pay roll funds of the carriers. As the spokesman for the carriers expressed it:

> " 'The only change it proposed to make from the one that had been in effect all the years before was simply to add the element of a guarantee to these men. These men had been working all the years, generally speaking, for the tips they could get. The change that was proposed was to let them continue to do that, but add the one additional element of a guaranty to them that if they didn't make the minimum required by the law, the railroad would make it up to them' (369-370).

"Pursuant to this plan each carrier issued the following notice to its redcaps (or another notice similarly phrased):

(Here follows copy of accounting and guarantee notice.)

"In most instances copies of the notice were served personally upon each redcap and a receipt was required (89, 169, 175, 228). Verbal and written protests were made by some of the employees, but they were told that they must sign the receipts or cease working (82, 159, 160, 169, 204, 226-228, 239, 270-272). The record shows that in one instance the notice was posted on the bulletin board and no request was made that the redcaps employed in that station sign it (324-325).

"The contention of the Association of American Railroads is that these notices served upon the employees constituted enforceable contracts entered into as a condition of employment and resulting in a constructive turning over of tips to the employer and payment back to the employee.

"Results Growing Out of the Operation of the 'Accounting and Guarantee' Arrangement.

"Testimony offered at the hearing shows convincingly that the records kept by the carriers of tips reported as received by redcaps do not represent accurately the tips received by these men. Under the present minimum, redcaps must receive wages at the rate of two dollars for working an eight-hour day. The record is replete with statements that redcaps, unable to earn the minimum in tips during the day, falsely register that amount on the record slips provided by the employer (32, 57-63, 82-84, 161, 192). Numerous redcaps testified at the hearing that they padded their reports when they made less than 25 cents an hour in tips (192, 328). The reason for this false reporting of tips was said to be the fear of discipline or discharge by the carriers for failing to report the minimum (146, 161, 171, 177, 310-314). However, it appears to have become well-nigh the universal practice to report $2 each and every day, even in cases where the men have always received considerably more than $2 in the past; such falsification, initiated by the redcaps themselves and continued on the advice of their union officers, presumably on the ground that the railroads themselves are not interested in accurate records beyond the receipt of $2 per day (349), must have its basis in other considerations than the fear of discipline or discharge. The railroads have acquiesced in this practice.

"There was testimony that a station master told the employees to report 25 cents an hour regardless of whether the amount reported was actually earned (170). One witness testified that the station master in a large city had discontinued requiring the men to report and advised the redcaps that henceforth the railroad would report 25 cents an hour for the men (137). Witnesses testified that several of the redcaps were discharged for failing to report 25 cents an hour (160, 171). The record contains allegations that false reports of tips were made by redcaps from fear of dis-

cipline or the possible loss of employment, whether such fears were justified or not. On the other hand, the Association of American Railroads has submitted documentary evidence supported by affidavits to show that at many of the stations where these specific charges were made the railroads have repeatedly made up the difference between amounts reported by the men and the guarantee and that at these stations no reductions in the number of redcaps employed have been made as a result of the guarantee.

"The 'accounting and guarantee' arrangement by which most of the carriers compensate their redcaps is of necessity applied by minor company officials, local officers such as station masters, head porters, and station agents. It appears from the record that many of these officials have made it be known in one way or another that the redcaps ought to report the receipt of two dollars for eight hours work regardless of the amount actually received. The possible misapplication of the arrangement by subordinate officials is admitted by counsel for the Association of American Railroads in the following statement (392):

> " 'I have had personal experiences, and everyone else has had, of subordinate officers not carrying out strictly the intent of the instructions that they get from above, and I wouldn't be surprised to find that in some instances there have been actions of the sort that have been charged here, that is, certain men in immediate charge of these fellows, for fear of criticism by some one above them, indicated to these fellows what they wanted them to do.'

"The testimony substantiates this statement and fully demonstrates the impossibility of determining from the records of carriers kept to conform with the regulations of the Wage and Hour Division whether redcaps are receiving the minimum wage provided by the Act.

"Part 516 are Regulations and Records to be **Kept**

by Employers Issued Pursuant to Section 11 (c) of the Fair Labor Standards Act. The carriers appear to have taken rather lightly their own obligations to keep accurate records. In answer to a charge made at the hearing that 'redcaps are required to turn in slips showing checks of $2 in tips before they can go to work so that the records will be in shape' (137), the carrier replied in an affidavit that the slips of the redcaps 'are deposited in a box * * *. It may be that they are placing the report in the box before they complete their day's work. For this the company is not responsible' (Memorandum, Caption 5). This is a totally unwarranted assumption. It is the Company's obligation to keep accurate records under the law and the regulations and this shedding of responsibility, directly traceable to the 'accounting and guarantee' arrangement, is indicative of the lighthearted attitude taken by some of the officials of the carriers toward their obligation under the Act. In another terminal the form of the slip required to be filled out by the redcaps was changed after the Act was in effect five months and thereafter it did not even have a provision for reporting tips received. The Company alleges, however, that 'redcaps have specific instructions at the end of each pay roll period when they report to the auditor's office to pay Railroad Retirement Act taxes to report at that time if during the period they failed to receive in tips an amount equal to the sum they were entitled to receive under the Fair Labor Standards Act. It is generally understood by the redcaps that the Terminal Company will pay any difference upon redcaps reporting the amount necessary to meet the minimum requirements' (Memorandum, Caption 5). This is only another indication of the casual handling by subordinate officials of the obligations of the carriers under the Act. * * *

"Finding and Recommendation.

"In the light of all the evidence there can be no conclusion other than that the pay roll records of the

carriers for redcaps generally do not accurately record the data as to wages paid. It also appears that there is grave legal doubt as to the validity under the Fair Labor Standards Act of the accounting and guarantee arrangement which the carriers have used. It is, therefore, recommended:

"1. That the Division take immediate steps through court action to determine the validity of the accounting and guarantee arrangement under which many redcaps are employed.

"2. And, pending an authoritative court decision determining the validity of the accounting and guarantee arrangement, that employers be required to keep records which show separately from other amounts paid as wages, the amount of tips which are claimed by the employer to be wages paid.

"3. It is also desirable that records kept by employers for employees engaged in occupations in which tipping may occur shall record the number of hours worked each week in such tipping occupations separately from the number of hours worked in other occupations, if the employee accounts for or turns over to the employer the amount of tips received from third persons."

The fact that plans such as the accounting and guarantee plan in this case will lead to the defeat of the purposes of minimum wage legislation was forcefully pointed out in a paper written by Mary A. Anderson, Director of the United States Women's Bureau, United States Department of Labor, entitled "Tips in Relation to Minimum Wages," and published in the March, 1941, issue of The American Labor Legislation Review:

"Our second principle is that tips should not be counted as part of the legal minimum wage. For example, if $16 is established as the legal wage, the employer should not be permitted to pay the worker only the difference between the tips she receives and the minimum wage of $16. If the contrary policy

were followed, the employee would be required to report to her employer the amount of tips received each week in order that he in turn could know the amount of wages he must pay to make up the $16.

"If this practice were followed the purpose of the minimum wage law would soon be defeated. It would not be long before employers discovered which of their employees are costing them the most money. Obviously, the girls who received the least in tips would have to be paid the highest wages to make up the $16. Gradually the girls receiving low tips would be dismissed, whether efficient or not, and those with ability to wile larger tips from an irresponsible public would be employed in their places. The workers would be no slower than the employers in discovering the effects of the reporting system on their welfare. The dismissal of one or two workers would be sufficient to warn the others that if they were to retain their jobs their tips must equal those of their more fortunate co-workers. There is always one effective way out of a situation like this for the worker who is desperately in need of a job, and that is to report to her employer a greater amount of tips than she actually receives. The whole purpose of the minimum-wage law, that of guaranteeing the worker a living wage, would be defeated if this practice were permitted and the State authorities would be almost helpless to correct the situation."

It is true, as we have said, that the agreed statement of facts in this case shows that each redcap received in tips or wage payments from respondent an amount equal to or in excess of the amount of the minimum wages provided by the act. However, the fact that the accounting and guarantee plan may in certain cases result in the redcaps receiving in tips and wage payments an amount equal to the minimum wage does not eliminate the inherent vice of the plan.

The purpose of Congress to prevent labor disputes bur-

dening and obstructing commerce, and the free flow of goods in commerce, intended to be carried out by the requirement that the employer pay a decent minimum wage to his employees is not effectuated by the accounting and guarantee plan. In fact, it is obvious that this plan is apt to lead to serious labor disputes and to dissatisfaction on the part of those employees who are working under the plan. In this particular case the redcaps are discriminated against as a class, since other railway employees, such as dining car waiters and Pullman porters, who are paid a substantial wage by their employers in excess of the minimum wage required by the Fair Labor Standards Act, are permitted to retain their tips, while the redcaps under this arrangement must credit the tips against the minimum wage. The dissatisfaction of the redcaps with this system is evidenced by the filing of this suit, and other similar suits. A redcap who fails to earn the minimum per hour in tips becomes an unnecessary expense to his employer, and the employer can for legitimate business reasons discharge him. Redcaps who are unable to produce, and being fearful of probable discharge, will in all likelihood falsify their reports to indicate an income of at least the minimum per hour. This will create a situation which encourages dishonesty, and at the same time contravenes the fundamental provisions of the act in that such a man will be forced to subsist upon less than the minimum prescribed by the act. It will only be natural for the railroads to check up on the men and spy on them if they report a smaller amount in tips than the minimum wage. This will engender suspicion, bitterness and strife, and a system of checking, or even espionage, will be inaugurated. The act will thus increase rather than decrease conditions which are detrimental to the "general well-being" of the redcap, and will lead to "labor disputes burdening and obstructing commerce, and the free flow of goods in commerce."

We submit that it is evident that Congress could not have had in mind permitting any such arrangement as the accounting and guarantee plan devised by the railroads to evade the duty imposed upon them by the act to pay their employees wages. The law is plain; it says every employer shall pay each of his employees who is engaged in commerce wages at the minimum rates, and since it is plain, there is no occasion for construction. United States v. Missouri Pacific Railroad Company, 49 Sup. Ct. 133, 278 U. S. 269, 72 L. Ed. 322; Russell Motor Car Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778; Albert and J. M. Anderson Manufacturing Company v. United States, 43 Sup. Ct. 428, 261 U. S. 514, 67 L. Ed. 778.

V.

ON THE QUESTION OF THE ABANDONMENT OF THE ACCOUNTING AND GUARANTEE PLAN BY RESPONDENT DURING THE PERIOD FROM MARCH 1, 1939, TO OCTOBER 15, 1939.

Even if the Court Should Hold That the Accounting and Guarantee Notice Became a Part of the Employment Contract of the Redcaps and That the Plan Was a Compliance With the Fair Labor Standards Act, the Plan Was Abandoned by Respondent During the Period From March 1, 1939, to October 15, 1939, During Which Period the Redcaps Were Instructed by Respondent Not to Report Their Tips, and Hence Petitioner Is at Least Entitled to Recover Wages and Liquidated Damages for This Period.

Even if this Court should hold that the accounting and guarantee plan became a part of the employment contract of the redcaps, and that the carrying out of the plan by respondent was a compliance with the Fair Labor Standards Act, petitioner is clearly entitled to recover the unpaid

minimum wages accruing to the redcaps during the period from March 1, 1939, to October 15, 1939, and liquidated damages in an equal amount, as the accounting and guarantee plan was abandoned by respondent during this period. The record shows that prior to March 1, 1939, respondent prepared and furnished to the redcaps a new form of time slip, and instructed them that commencing March 1st they would not be required to report the tips received by them, but would only be required to report the hours they worked each day (R. 130, 136). Even if it could be said, therefore, that by the accounting and guarantee notice, respondent asserted a claim to ownership of the tips, which we deny, this claim was completely abandoned on March 1, 1939, when respondent instructed the men that they should no longer report their tips. It is true that the respondent stood ready to pay the redcaps if they reported their tips had not equalled the minimum wage, but respondent would have been bound to pay this difference in any event without any agreement, even if tips are wages as a matter of law under the Fair Labor Standards Act.

VI.

ON THE QUESTION OF WHETHER TIPS ARE WAGES UNDER THE FAIR LABOR STANDARDS ACT.

Tips Received by an Employee Are Not Wages Paid by the Employer and May Not Be Considered in Determining Whether the Employer Has Complied With the Fair Labor Standards Act.

We believe we have shown that, in the absence of an agreement to the contrary, tips received by an employee in the course of his employment are his property and not the property of the employer, and that in this case the

respondent's accounting and guarantee notice did not effect any change in this ownership of the tips. If we are correct in our contentions we must next decide whether the language of the Fair Labor Standards. Act is such that the requirement of Section 6 of the Act that every employer shall pay each of his employees who is engaged in commerce wages at certain minimum rates may be so construed that tips received by an employee during the course of his employment may be included as wages paid by the employer in determining whether the employer has complied with the act. The determination of this question depends upon the construction of the language of the act, and particularly of Sections 6 and 3 (m) of the act [29 U. S. C. A., Sections 206 and 203 (m)]. The pertinent parts of Section 6 and Section 3 (m) read as follows:

> "Sec. 6 (a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rate—
>
> "(1) during the first year from the effective date of this section, not less than 25 cents an hour.
>
> "(2) during the next six years from such date, not less than 30 cents an hour."
>
> "Sec. 3 (m). 'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."

The courts have defined "wages" as follows:

> "Both salary and wages are terms invariably used in defining the consideration which an **employer bestows upon** one who is serving him in consideration of his services, and is never applied in describing the gain, profit or recompense which accrues to one who

is conducting a business of his own and upon his own account." (Emphasis ours.)

Roberts v. Frank Carruthers and Bros. (Ky. 1918), 202 S. W. 659, 661.

"Wages is the reward agreed to be paid by the master to the servant or person whom he hires to do business for him." (Emphasis ours.)

Gay v. Hudson River Elec. Power Co., 178 F. 499, 503, citing Moore v. Heaney, 14 Md. 558.

"The word 'wages' means the compensation to a hired person for his services. This compensation may be a specified sum for a given piece of service, or a fixed sum for a given time of service."

Ford v. St. Louis etc. Ry. Co., 54 Iowa 728, 7 N. W. 126, 128.

"Wages in its ordinary acceptation has a less extensive meaning than salary. Wages is usually restricted to sums paid as hire or reward to domestic or menial servants, and to sums paid to artisans, mechanics, laborers, and others employed in various manual occupations, while salary has reference to the compensation of clerks, bookkeepers, other employees of like class, officers of corporations, and public officers."

Massie v. Cenna, 28 L. R. A. (N. S.) 1108, 239 Ill. 352, 88 N. E. 152.

"Wage means payment for services rendered, especially the pay of manual laborers receiving fixed pay for a day, week or month."

Colver v. Foster Screen Co., 99 N. J. Eq. 734.

"Wages is a compensation given to a hired person for his compensation agreed upon by the master to be paid to a servant."

La Juett v. Coty Machine Company, 272 N. Y. S. 822.

The term "wages," as distinguished from salary, is

commonly understood to apply to compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, season or piece, but not by the job. The term does not include profits on the services of others, and it is not so broad as "earnings," which comprehends returns from skill and labor in whatever way acquired.

First National Bank of Wilkes-Barre v. Barnum, 160 F. 245.

In the case of Booker v. Pennsylvania Railroad Company, 82 Pa. Super. 588, a passenger sued for the value of a suit case lost through the alleged negligence of a redcap. The carrier, defending on the ground that the redcap was not an employee, but was the plaintiff's personal servant, offered in support of this position the contention that the redcap received no wage from the company. In passing upon that contention the Court remarked:

> "The money paid by the passenger was not compensation which the porter could have demanded or sued for in an action, but was rather a gratuity or tip which she was not bound to give and which the porter could not have recovered in an action of assumpsit if the passenger had not seen fit to give it. The fact that a traveler gives a tip to a porter for courteous service in the carriage of his hand luggage does not make the porter his servant for whose negligence he is responsible any more than a tip given to a bell boy in a hotel, to a waiter in a restaurant, or to a hat check employee, changes the status of their respective employment. Nor does the fact—if such is the case—that the railroad company does not pay its employees while they are 'portering only,' but that their sole source of revenue in such circumstances is the tips which they receive from passengers, negative the continuance of their employment while acting as porters or relieve the employer of responsibility for their acts within the scope of their employment."

The Pennsylvania Court in this case clearly pointed out the essential difference between tips and wages, for a tip is purely a gratuity which the passenger is not bound to give, nor the recipient entitled to compel, while wages are a fixed definite amount which the employee may recover from the employer.

The fact that Congress in using the word "wages" in the Fair Labor Standards Act intended it to have its usual meaning, which certainly does not include tips, is evident from the fact that in section 3 (m) of the act in stating what the word "wages" should include, Congress did not see fit to include tips or gratuities. Section 3 (m) provides that "wage" paid to an employee includes the reasonable cost as determined by the administrator to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees, but says nothing about tips or gratuities. Congress apparently was of the opinion that the meaning of the word "wages" was clear and did not include tips, and for that reason did not consider it necessary to exclude tips from the definition of wages. On the other hand, Congress did find it necessary under the Carriers Taxing Act of 1937, which requires an income tax to be paid by employees, and an excise tax to be paid by employers on **compensation** paid to an employee for services, to provide expressly that the term "compensation" should not include tips [45 U. S. C. A. 261 (e)]. Again under the Railroad Unemployment Insurance Act, which requires the employer to pay contributions on **compensation** paid by him, Congress found it necessary to define the term "compensation" so as to exclude tips [45 U. S. C. A. 351 (i)]. It is evident, therefore, that Congress, recognizing the fact that "wages" is a word of well defined and settled meaning, saw no need of defining it so as to exclude tips in the Fair

Labor Standards Act, while it did feel that the word "compensation" used in the Carriers Taxing Act of 1937 and the Railroad Unemployment Insurance Act, being of broader meaning, might be construed to include tips, and for that reason expressly provided that "compensation" should not include tips. On the other hand, when Congress wanted to include tips as wages in the Longshoremen's and Harbor Workers Compensation Act (33 U. S. C. 902, Mar. 4, 1927, c. 509, sec. 2, 44 Stat. 1424), it found it necessary expressly so to provide when it defined wages as follows:

> (13) Wages means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer, **and gratuities received in the course of employment from others than the employer.** (Emphasis supplied.)

Obviously, the word "wages" in ordinary everyday usage does not include tips, and if Congress had meant to include tips it would have so provided in section 3 (m) of the act, where it set forth what "wages" should include. The fact that Congress in section 3 (m) said that "wage" paid to an employee should include the reasonable cost to the employer of furnishing such employee with board, lodging or other facilities, but made no mention of tips, is a clear indication that Congress did not intend that tips received by an employee from third persons should be considered wages paid by his employer.

The language of Judge Otis in the case of Harrison v. Kansas City Terminal Railway Co., 36 F. Supp. 434, l. c. 437, is pertinent here on the question of whether Congress meant to include tips as wages:

"To say that, within the intention of Congress as

expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept tips from travelers, is to assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so."

Respondent relies on cases arising under the various workmen's compensation acts which have held quite generally that tips of an employee are to be considered in determining an employee's average weekly earnings in fixing the benefits due him. These cases, however, are not in point, because almost invariably the workmen's compensation acts use comprehensive language which includes all the earnings of an employee arising out of his employment, regardless of their source.

Thus, in the case of Lloyds Casualty Company v. Meredith, 63 S. W. (2) 1051, the Court of Civil Appeals of Texas said:

"Subsection 4 of Section 1 of Article 8309 of the Workmen's Compensation Act which provides that the average weekly wages of employees shall consist not only of the regular salary or wages paid, but also 'include the market value of board, lodging, laundry, fuel and other advantage which can be estimated in money' is broad enough to include tips."

It will be seen that the language of this section, as the Texas Court said, is broad enough to include tips. Other cases holding tips to be earnings under the various state

workmen's compensation acts are distinguishable from the case at bar because of their use of some broad language such as "earnings," instead of "wages." The English case of Penn v. Spiers and Pond, Limited, 1 King's Bench Law Reports (1908) 766, l. c. 769, in holding that tips were earnings within the English Compensation Act, said:

> "It has often been pointed out in this court that the measure of compensation under the Act is not wages but earnings * * * 'Earnings in the employment do not always come from the employer.'"

The workmen's compensation acts cases are not authority for construing the word "wage," as used in the Fair Labor Standards Act, to include "tips," as the language is not as comprehensive as the workmen's compensation acts. Thus Section 3 (m) of the Fair Labor Standards Act (29 U. S. C. A., Sec. 203) defines wage as follows:

> "Wage paid to an employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees."

Obviously, the opportunity afforded by the employer of redcaps to receive tips entails no cost on the employer and certainly, if there is any cost, the tips received by the employee are not the measure thereof. There is no general language used in Section 3 (m) of the Fair Labor Standards Act, such as the word "advantage" used in the Texas statute, under which the opportunity to receive tips might justify their inclusion as wages.

The state minimum wage acts are silent as to whether tips are to be considered as wages, but by administrative rulings in those states where there are rulings, they have been excluded from the minimum wage required to be

paid. Thus, in California Order No. 12-A, covering hotels and restaurants, provides "no employer may include tips or gratuities received by employees designated under Section I hereof as part of the legal minimum wage fixed by said section of the order" (i. e., $16.00 a week). In Connecticut, by Order No. 5, pertaining to beauty shops, tips may not be counted as part of the minimum wage. In the District of Columbia the order governing public housekeeping made May 8, 1939, provides that "in no case shall gratuities or tips be included as any part of wages fixed under Paragraph 2 of this order," and the same provision is in the order applying to the beauty culture occupation made September 26, 1938. In Massachusetts the order on the retail store occupation provides that tips are not wages. In New Hampshire Mandatory Order No. 3, applying to the restaurant occupation, provides that tips are not part of wages. In New York Order No. 2, pertaining to beauty occupations, provides "in no event may tips be counted as part of the minimum wage." In Ohio Mandatory Order No. 3, applying to food and lodging occupations, provides "tips or other gratuities received by an employee shall not be considered wages under this order." In Oklahoma Obligatory Order No. 3, applying to the restaurant industry, states that "gratuities, gifts or tips constitute no part thereof" (i. e., of wages). Obligatory Order No. 5, applying to the hotel industry, contains the same provision. In Oregon the order pertaining to the public housekeeping occupation provides that "in no case shall gratuities be included as any part of wages." In Washington it has been ruled that tips are not wages.

In the following twenty-seven states the unemployment compensation acts specifically provide that tips shall be included in the definition of remuneration and wages: Arizona, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Louisiana, Mary-

land, Minnesota, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and Washington. The fact that the legislatures of these states deemed it necessary to provide for an express inclusion would indicate that, unless they are expressly included, tips would not be considered a part of wages.

In those states where tips are not specifically included in the definition of wages under the unemployment compensation acts, and where there has been a ruling or regulation on the subject, the state authorities have ruled that tips are not deemed wages, namely, in California, Indiana, Iowa, Massachusetts, New Jersey and Oregon. Thus, in California, tips are not deemed wages. Department of Employment Rule 8.13, 1939 CCH Unemployment Insurance Service, Paragraph 5008.13. In Indiana tips are not wages. Indiana Unemployment Compensation Board Regulations 610, 1939 CCH Unemployment Insurance Service, Paragraph 6170. In Iowa tips are not considered a part of wages. 1939 CCH Unemployment Insurance Service, Paragraph 1230. In Massachusetts tips are not wages. Unemployment Compensation Commission, official interpretation 2 (9), 1939 CCH Unemployment Insurance Service, Paragraph 8004. In New Jersey tips and other gratuities are not included as wages. Unemployment Compensation Commission Ruling I, 1939 CCH Unemployment Insurance Service, Paragraph 1201.03. In Oregon tips are not wages. Ruling 22, Unemployment Compensation Commission, 1939 CCH Unemployment Insurance Service, Paragraph 5022.

The Supreme Court of New Jersey, in Case No. 208 for the January Term, 1941, decided September 16, 1941, entitled "Alexander Hamilton Hotel Corporation, Prosecu-

tor, v. Board of Review of the New Jersey Unemployment Compensation Commission et al., Defendants," held that tips received by a waiter were not wages under the New Jersey Unemployment Compensation Act, which defined "wages" as "remuneration payable by employers for employment," and "remuneration" as "all compensation payable for personal services, including commissions and bonuses, and the cash value of all compensation payable in any medium other than cash." In its opinion the Court said:

> "Thus it is that the term 'wages' is categorically limited to the remuneration 'paid' or 'payable' by the employer to the employee for the latter's service. And the definition of 'remuneration' plainly is confined to such as has been 'paid' or is 'payable' by the employer. It is but fair to presume that, if more were within the intention of the lawmaking body, appropriate language would have been chosen to give expression to it."

In rejecting the holding of the Board of Review that tips should be included in the fixation of unemployment compensation benefits because, "while the tips were not paid directly by the employer, they were part of the remuneration resulting from the employment furnished by" the employer, and that since the parties adjusted "the wage scale in direct proportion to the amount of tips expected, the tips must be regarded as part of the remuneration for employment and not as mere gratuities," the Supreme Court of New Jersey said:

> "This is a misapprehension of the statute. We are enjoined to interpret and apply this enactment in accordance with the expressed legislative will, rather than some supposed unexpressed intention — even though, in the view of the interpretative authority, that would be more in consonance with reason and justice. **Where the terms employed to declare the legislative purpose are clear and precise, and are not of**

> **doubtful meaning, there is no room for construction.** The judicial function is to enforce the revealed object as so delimited." (Emphasis ours.)

Judge Atwell in the case at bar applied the same rule in holding that tips were not wages under the Fair Labor Standards Act, saying (R. 279):

> "So that one would be drifting without an excuse to seek to attempt to read into this statute something that is not in it. **There is no ground for construction.** It is plain, and says what shall be done and what shall not be done." (Emphasis ours.)

We understand that the accounting and guarantee plan is based on a ruling of the Bureau of Internal Revenue under the Social Security Act appearing in Internal Revenue Bulletin 1938, No. 25-940.1 The Bureau of Internal Revenue in this ruling answered the following question:

> "If a hotel or restaurant guarantees its waiters a fixed income consisting partly of remuneration paid by the restaurant and partly by tips, does such a guarantee affect the status of the tips received by the waiters?"

The Bureau's answer was:

> "Inasmuch as the employer bases the remuneration of the employes on the amount of such tips and since the employes must inform the employer of the amount of tips received in order that the latter may compute the balance due the employes, it is clear that such tips constitute wages within the meaning of Titles 8 and 9."

This ruling, however, is no authority for the legality of the railroads' accounting and guarantee plan. In the first place, the definition of wages in the Social Security Act differs greatly from the meaning of the term "wages" as used in the Fair Labor Standards Act. Thus Section 811 of Title 8 of the Social Security Act in effect at the time of the above ruling read:

"(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash,"

and section 907 read:

"The term 'wage' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash."

The term "remuneration for employment" is obviously broader than the term "wages," and might properly be said to include tips. The Fair Labor Standards Act, however, imposes the duty on the employer to pay **wages.** The above ruling of the Bureau of Internal Revenue did not, of course, consider any minimum wage law since the hypothetical arrangement was purely contractual, and the ruling is entitled to no weight in determining whether the requirements of a minimum wage act under which an **employer** is bound to pay a certain minimum **wage** may be met by the employer requiring the employee to pay the greater part of that wage out of tips given him by patrons of the employer.

Decisions of the courts or rulings of administrative officers and agencies that tips may or may not be included as wages for purposes of the workmen's compensation, unemployment compensation, or old-age pension laws are not of much value, however, under the Fair Labor Standards Act. These decisions and rulings are under statutes (such as the Social Security Act and Workmen's Compensation statutes) levying taxes to build up reserves of money benefits for industrial employees who become injured in the course of their employment, or become unemployed, or become superannuated. To effectuate the purposes of such statutes the courts properly construe "wages" to include tips, so that employees may be assured benefits based upon their real income. But the policy and language of the

Fair Labor Standards Act would not be served by any such construction.

We respectfully submit, therefore, that a fair construction of the language of the Fair Labor Standards Act leads to the conclusion that tips received by an employee from patrons of his employer may not be considered as payment of wages by the employer within the meaning of Section 6 of the Act.

VII.

ON THE QUESTION OF THE ACCOUNTING AND GUARANTEE PLAN VIOLATING THE INTERSTATE COMMERCE ACT.

Respondent's Argument That the Tips Received by the Redcaps Were Its Property Is Based on Its Contention That the Tips Were Its Charges to the Donors Thereof for Services Rendered Them by the Respondent Through the Redcaps. The Tips Cannot Be Considered Charges Made by the Respondent, Since They Are Not Uniform in Amount, and No Tariff Authorizing the Respondent to Receive the Same Has Been Filed With the Interstate Commerce Commission, and the Charge Would Be Unlawful Under Sections 2 and 6, Paragraph 7, of the Interstate Commerce Act (Title 49, U. S. C. A., Sections 2 and 6, Paragraph 7).

In its brief filed in the Circuit Court of Appeals respondent contended that the tips received by the redcaps were its property because the tips were the charges made by the respondent to the donors thereof for services rendered them by the respondent through the redcaps. It is obvious, however, that the tips were never meant to be charges because the tips were voluntarily given by the patrons, and they were under no compulsion to tip at all. Furthermore, the Court should not construe the tips as charges made by re-

spondent, as the Court would thereby necessarily hold that respondent was guilty of two violations of the Interstate Commerce Act, since under that act, if respondent is to charge for transportation service, all charges for similar service must be uniform, and no charge at all can be made unless a tariff is first filed with the Interstate Commerce Commission. Thus section 2 of this act (Title 49, U. S. C. A., Section 2) reads as follows:

> "Sec. 2. Special rates and rebates prohibited. If any common carrier, subject to the provisions of this chapter, shall, directly **or indirectly**, by any special rate, rebate, drawback, **or other device**, charge, demand, collect, **or receive** from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." (Emphasis ours.)

Respondent's contention that by reason of the notice of October 22, 1938, the tips which passengers gave to the redcaps became a charge which respondent was making to the passengers for the service which it was rendering them through its employees cannot be sustained because such an arrangement is clearly unlawful under the plain terms of Section 2 of the Interstate Commerce Act, since it would be a device whereby respondent would receive from one passenger a greater or less compensation for the service rendered than it would receive from another passenger for a like service. As a matter of fact, some passengers did not tip at all, but, nevertheless, the redcaps were re-

quired to offer their services to all travelers, to the sick and poor as well as to the prosperous-looking, and to accept any amount offered as a tip by the passengers, and not to indicate by word or action any dissatisfaction with the amount.

The notice of October 22, 1938, cannot be construed as a contract on the part of the men to turn over their tips to the respondent because such an arrangement would be tantamount to the respondent making a charge for its service, and respondent has no right to make a charge for any transportation service without first filing with the Interstate Commerce Commission a tariff therefor. Section 6, Par. (7) of the Interstate Commerce Act [Title 49, U. S. C. A., Section 6, Par. (7)] reads as follows:

> "Sec. 6, par. (7). Transportation without filing and publishing rates forbidden; rebates, privileges. No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The Interstate Commerce Commission, in case No. 28,495, decided June 25, 1941, entitled "Ida M. Stopher v. Cincin-

nati Union Terminal Company, Inc.," held that redcap service was a transportation service, and that Section 6 of the Interstate Commerce Act required that a tariff be filed before a charge could be made by the defendant therein for redcap service. Respondent cannot now contend that the tips were charges made by it for redcap service without admitting that it has been guilty of a violation of this section of the Interstate Commerce Act.

VIII.

ON THE QUESTION OF WHETHER THE REDCAPS MAY WAIVE THEIR RIGHTS UNDER THE FAIR LABOR STANDARDS ACT.

Since Section 6 of the Fair Labor Standards Act Requires the Minimum Wages to Be Paid by the Employer, the Employee May Not by Contract Waive His Rights Under the Act and Agree That His Wages May Be Paid by Tips Which Are His Own Property.

The Circuit Court of Appeals in the Williams Case held (118 F. [2d], l. c. 327) that the Fair Labor Standards Act "undoubtedly contemplates that the employee shall be paid his wages by the employer out of the employer's funds." It is because respondent realizes this that it is necessary for it to argue that the tips were the property of the respondent, so that when it permitted the redcaps to retain the tips it might contend that they were retaining the respondent's money, and, therefore, the respondent was paying them wages out of its money. If, however, the tips were the property of the redcaps, as we believe we have shown, then it cannot be said that respondent paid wages to the redcaps by permitting them to retain their own money. If the tips were the property of the redcaps, then respondent has not complied with the Act, since it has paid the redcaps no wages out of its own funds;

unless the Court holds that the redcaps, by continuing to work after the accounting and guarantee notice was served on them, agreed that their tips, which were their property, would be accepted by them in lieu of a wage payment by respondent. Respondent cannot so contend, however, because such an agreement would be void and of no effect, as it would be an attempt to force the redcaps to waive the greater part, if not all, of the benefits given them by the act.

It has uniformly been held that an employee may not by contract waive the benefits of a minimum wage law. Thus, in the case of the City of Glendale v. Coquat, 52 P. (2nd) 1178, the Supreme Court of Arizona held that a municipal employee might not waive the benefits accorded by the Arizona Minimum Wage Act, saying:

> "As we have stated in several cases, the minimum wage law is not only meant for the establishment of individual private rights, but is a solemn declaration on the part of the state that, as a matter of public policy, it is interested in seeing that its citizens are protected in such rights. City of Phoenix v. Drinkwater, supra: State v. Jaastad (Ariz.), 32 P. (2nd) 799; State v. Anklam (Ariz.), 31 P. (2nd) 888. It is apparently universally held that where a right has been given to an individual not alone for his private benefit, but, as a matter of public policy, in the interest of the state, it may not be waived by anyone. Day v. McAllister, 15 Gray (Mass.) 433; Clark v. Spencer, 14 Kan. 398, 19 Am. Rep. 96; State v. Carman, 63 Iowa 130, 12 N. W. 691, 50 Am. Rep. 74; Recht v. Kelly, 82 Ill. 147, 25 Am. Rep. 301; Bosler v. Rheem, 72 Pa. 52; Branch v. Tomlinson, 77 N. C. 388; Clark v. State, 142 N. Y. 101, 36 N. E. 817; Larsen v. Rice, 100 Wash. 642, 171 P. 1037; Cato v. Crandel Cotton Mills, 132 S. C. 454, 129 S. E. 203, 41 A. L. R. 439."

Likewise in the case of Larsen v. Rice, cited in the Coquat case, the Supreme Court of the State of Washington held

invalid and unenforceable a contract whereby a woman employee agreed to accept less than the minimum wage per week fixed by the Washington Minimum Wage Act. The Court there stated:

> "But the controversy here had an added element not found in the ordinary controversy between individuals. It was not wholly of private concern. It was affected with a public interest. The state, having declared that a minimum wage of a certain amount is necessary to a decent maintenance of an employee engaged in the employment in which the respondent was engaged, has an interest in seeing that the fixed compensation is actually paid. The statute making the declaration not only makes contracts of employment for less than the minimum wage void, but has sought to secure its enforcement by making it a penal offense on the part of the employer to pay less than the minimum wage and by giving to the employee a right of action to recover the difference between the wage actually paid and such minimum wage. The statute was not, therefore, intended solely for the benefit of the individual wage earner. It was believed that the welfare of the public requires that wage earners receive a wage sufficient for their decent maintenance. The statute being thus protective of the public as well as of the wage earner, it must follow that any contract of settlement of a controversy arising out of a failure to pay the fixed minimum wage, in which the state did not participate, is voidable, if not void."

In Holden v. Hardy, 169 U. S. 366, 397, the Supreme Court said:

> "The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that **the proprietors of these establishments and their operatives do not stand upon an equality**, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are

> often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. **In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority.**" (Emphasis ours.)

We have shown under point III, supra, that the accounting and guarantee plan, even if it became a part of the employment contract of the redcaps, which we deny, was no more than an agreement on the part of the redcaps to accept tips received from the traveling public as payment of wages by the respondent. If we are correct in our contention that the tips were the property of the redcaps, then the agreement of the redcaps to accept their own property in payment of wages due from respondent under the act would be a waiver of the benefits given them by the act, and would be wholly ineffectual under the foregoing authorities.

CONCLUSION.

Petitioner respectfully submits that the opinion of the Circuit Court of Appeals for the Fifth Circuit in this case is clearly erroneous in holding that the receipt and retention by the redcaps of tips given them by passengers was payment of wages by respondent; that the accounting and guarantee notice did not become a part of the employment contract of the redcaps both because of the absence of any meeting of the minds of the parties on the terms thereof, and also because respondent could not put such plan in operation without first complying with the Railway Labor Act; but that even if said notice did become a part of the employment contract of the redcaps, it did not effect any change in the ownership of the tips; that there being no

agreement to the contrary, the tips were the property of the redcaps, and the retention of these tips—their own property—by the redcaps was not payment of wages by respondent as required by Section 6 of the Fair Labor Standards Act; that, furthermore, the carrying out by respondent of the accounting and guarantee plan was not a compliance with the Fair Labor Standards Act because the purpose of said act will be defeated if said plan is permitted, because it so easily lends itself to evasion of the duties prescribed by the act; and that in any event tips are not wages under the plain terms of the act, and respondent had no right to consider them as such.

Petitioner, therefore, respectfully submits that the judgment of the Circuit Court of Appeals should be reversed, and the cause remanded with directions to affirm the judgment of the trial court.

Respectfully submitted,

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No. 1023 (October Term, 1940).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER.

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Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY BRIEF OF PETITIONER.

WAGE MUST BE PAID BY EMPLOYER.

Respondent does not and cannot deny that the Fair Labor Standards Act imposes upon it, as the **employer**, the duty to **pay a wage** (of not less than a specified amount) to each of its employees.

Respondent recognizes that this obligation can be discharged only by payment **out of funds** belonging **to it as employer.**

The language of the act, imposing this obligation is clear and unambiguous: "Every employer shall pay to each of his employees engaged in commerce—wages." (Note that it does not say that each employee shall receive as his hourly or daily compensation money of not less than a specified amount. **The amount received under this law must come from the employer.**)

CHARACTERISTICS OF TIPPING SYSTEM.

Recognizing that the obligation laid upon the employer can be discharged only by payment out of the funds of the employer, respondent seeks to assert ownership of the **tips** given by passengers to redcaps, and to appropriate them to the discharge of its obligation. This cannot be done for the following reasons:

At the time the Fair Labor Standards Act went into effect and prior thereto, the tipping system was in effect.

This system had the following characteristics:

(a) No wage was paid redcaps by respondent;

(b) No charge was made by respondent (or by the redcaps) for any service rendered;

(c) All moneys received by redcaps came from passengers as their voluntary act. What they gave was a pure tip or gratuity;

(d) Passengers generally understood that, when they gave tips to redcaps, the money became the property of the redcaps and not of the respondent;

(e) Respondent did not claim or assert any ownership of the money handed redcaps by the passengers. "They knew that what they paid did not go to the terminal company, but was the meat and bread of the redcap." [Wil-

liams v. Jacksonville Terminal Co., 118 Fed. (2nd) 324, l. c. 326.] The nature of this system then in effect is made clear by Judge Otis in the following language:

> "To say that, within the intention of Congress as expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept tips from travelers is to assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day, understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so" (Harrison v. Kansas City Terminal Railway Co., 36 F. Supp. 434, l. c. 437).

NOTICE DID NOT CHANGE TIPPING SYSTEM.

The notice served on the redcaps on October 22, 1938, did not abolish the tipping system or even purport to do so. The relations between the redcaps and the public remained the same; the redcaps were still to take **tips.** No change was effected between the **respondent** and the **public. No charge was imposed by respondent and none permitted by the redcaps.** The money which came from the public to the redcaps came just as it had come prior to the notice —as **tips.** The passengers who handed a redcap a tip before the notice intended it to be his "bread and meat" and manifestly so intended after the notice.

The only thing which respondent sought to change by the notice was the personnel of the **tippee.** Whereas the redcaps had theretofore been the beneficiary of the tips,

it proposed, by this notice to make itself the beneficiary. It proposed that thereafter the public should be permitted to tip—not the redcaps—but the Union Terminal Company, the respondent.

COMMON CARRIER CANNOT RECEIVE TIPS.

By this device respondent sought to lay hands on the tips, establish ownership of them and apply them to the payment of the statutory minimum wage.

Its purpose failed for two reasons:

(a) Because it failed to secure the consent of the redcaps to appropriate their property.

(b) Because, under the law and sound public policy, the respondent, as a common carrier, could not, even with the consent of the redcaps, be the recipient and beneficiary of tips, or assert ownership to money so received.

Proposition (a) has been so fully discussed in our original brief, and in the brief filed by the Solicitor General on behalf of the Administrator of the Wage and Hour Division as amicus curiae, that we shall add nothing more.

With respect to proposition (b) we say, frankly, that there is something positively revolting in the attempt of a **common carrier** to establish itself as the beneficiary of **tips.**

VICE OF THE TIPPING PRACTICE.

This attempt of respondent to make itself the beneficiary of tips becomes all the more revolting when we take a look at the inherent nature of the tipping system. We quote what eminent authority has had to say with respect to tipping:

The Supreme Court of Massachusetts has expressed

itself on this point—Power's Case, 275 Mass. 515, 176 N. E. 621, quoting from page 519 (623 of 176 N. E.):

> "The idea of tipping is distasteful to some people who would prefer to pay in increased charges enough to enable the appropriate wage to be paid directly to the employee by his employer. There is a feeling that tips are not in harmony with the spirit of American institutions and that they tend to put the recipient in a dependent or servile position and to undermine independence of character."

We quote a few excerpts from articles in well-known magazines, which proceed in a similar vein:

> "The tip is essentially degrading. It is twice curst; it curseth him that gives and him that takes. It gives to the one a feeling of patronage, and to the other a feeling of sycophancy. Customary as the habit has become, especially in restaurants, we are glad to see that most men cannot give or receive a tip without something in their manner indicating that they are ashamed of the act. The sneaking, careless or disdainful way with which the donor bestows his money and the furtive or oblivious manner in which it is gathered up are in marked contrast with the open and even exchange of money for merchandising across the counter. It is not true, as some argue, that it is just the same thing as though the service had been charged for in the bill. The mere fact that the amount is dependent on the caprice of the patron puts the employee in the position of inferiority, and takes the transaction out of the class of businesslike exchanges." The Independent, Vol. 55, p. 2068 (1903).

> "The employee hates being forced to seek as a condescending favor what should be his just due for work done." "Shall We Abolish Tipping?"—Reader's Digest, Vol. 33, No. 198, p. 107 (1938).

> "One of our best and most permanent evils is tipping. • • • Tipping itself is an offense to the code of American business ethics. It belongs in countries

where begging is a recognized life calling, where petty bribery of government employees is a recognized channel of revenue, where class distinctions are sharp and oppressive, and where cultivated servility is an art. But the custom is rooted in the United States, and it will grow and thrive until the great army of the tipped rises in rebellion and creates and demands a right to straight pay."—Collier's Weekly, July 30, 1927, Vol. 80, page 46.

"What, may I ask, is more un-American than tipping? It doesn't belong in American society. It doesn't belong in a democracy. It is the product of lands where for centuries there has been a servile class. Why should redcaps at railroad stations be dependent for a living entirely on the generosity of the traveler, and why should the traveler be annoyed and influenced by his fear of seeming cheap? There should be a fixed price for the carriage of each and every piece of luggage."—Vol. 99 of Forum, p. 231.

"Tipping, as a throwback to feudal times, is a mark of servitude. It is out of keeping with high business ethics and it stifles the desire to dignify one's profession. It makes for class distinction and has about as much place in a democratic society as the feudal lance, the rapier and the knout. It is hypocritical, absurd and undemocratic."—Rotarian, Vol. 56, p. 28 (June, 1940).

REDCAP SERVICE IS TRANSPORTATION SERVICE.

Redcap service is a transportation service. The Interstate Commerce Commission so ruled in Case No. 28,495, 244 I. C. C. 41, entitled Ida M. Stopher v. Cincinnati Union Terminal Co., Inc., decided June 25, 1941.

For the respondent now to persist in its attempt to defend its claim to the money received by the redcaps is to assume the burden of justifying its receipt of **tips in transportation service.** The very suggestion is abhorrent. To

countenance such a practice is to strike at the very foundations of fair, equal and nondiscriminatory service, which carriers are obligated to render.

Such a practice would fly in the teeth of Section 2 of the Interstate Commerce Act (Title 49, U. S. C. A., Section 2) which, for convenience, we set out again:

> "Sec. 2. Special rates and rebates prohibited. If any common carrier, subject to the provisions of this chapter, shall, directly **or indirectly**, by any special rate, rebate, drawback, **or other device**, charge, demand, collect, **or receive** from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful." (Emphasis ours.)

Section 1 (17) (b) of the Interstate Commerce Act [Title 49, U. S. C. A., Sec. 1 (17) (b), as amended September 18, 1940] recognizes that the giving to an employee of a carrier of any thing of value to cause him to favor one shipper over another in the supply, distribution or movement of cars used in the transportation of property is contrary to the policy of the Act, and makes such an act criminal, and a fortiori, should the payment of tips or gratuities to a carrier itself be contrary to the policy of the Act. This section of the Act reads as follows:

> "(b) It shall be unlawful for any person to offer or give or cause or procure to be offered or given, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, to

any person acting for or employed by any carrier by railroad subject to this part with intent to influence his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles, or vessels, used in the transportation of property. It shall be unlawful for any person acting for or employed by any carrier by railroad subject to this chapter to solicit, accept, or receive, directly or indirectly, any money, property, or thing of value, or bribe in any other form whatsoever, with intent to be influenced thereby in his decision or action, or because of his decision or action, with respect to the supply, distribution, or movement of cars or other vehicles or vessels, used in the transportation of property. Any person who violates the provisions of this subparagraph shall be deemed guilty of a misdemeanor and be subject for each offense to a fine of not more than $1,000, or imprisonment in the penitentiary for a term of not more than two years, or both such fine and imprisonment."

RESPONDENT MADE NO CHARGE AND THEREFORE COULD NOT ACQUIRE MONEY RECEIVED AS TIPS.

Respondent could come into ownership of this money only in the same way by which it acquires money in the transportation service: **by receiving it in payment of charges lawfully made.**

In this case it not only did not file a tariff, as required by Section 6, Par. 7, of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 6, par. 7), set out at page 80 of our original brief, but it made no charge in any manner or form. It **did not pretend to make a charge.** Any suggestion of a charge would be a pure afterthought.

If it be suggested that by our condemnation of **tipping in the transportation service** we, at the same time, con-

demn the receipt of tips by redcaps, for redcaps, and that they should not have received such money, then we answer that this would be no defense of the carrier's claim to the money. The law in such event would leave the money where it finds it—in the hands of the redcaps.

The upshot of the whole matter is that respondent is trying to pay a debt imposed upon it by law by the use of other people's money, which, of course, cannot be done.

Respondent cannot absolve itself from its obligation by pleading that the redcaps have already received money equal in amount to the minimum wage, and, therefore, that no further payment should be made. The question is not: "how much did the redcaps receive?" but **"how much did the respondent pay?"** Redcaps might have received the equivalent of the minimum wage from rentals of property owned by them, or from bequests from others. Would that have discharged respondent's obligation? The question answers itself. The clear, emphatic, unambiguous language of the act is that **"every employer shall pay."**

When a court decrees that an employer **shall pay** a debt clearly imposed by law, that's not "judicial brigandage"; that's compliance with law; that's justice. When a court lays on the penalty fixed by the lawmakers for failure to comply with a clear mandate of the law—that again is nothing more or less than compliance with the law to which the exalted as well as the lowly must bow.

We think it not inappropriate to observe that the receipt by men—black or white—who render the high order of service performed by redcaps, of three times the pitiful minimum regularly allowed, is not such a "bonanza" for these worthy men as to move a dignified judge to "holy" wrath or "righteous" indignation. It would not be unseemly for someone to suggest that at least for a

brief period redcaps are receiving something like fair compensation for the fine service they render the public **and the carriers.** In this connection the Court should take judicial notice of the recent wage settlement between the carriers and the employes, made December 15, 1941, in which the **minimum** for redcaps represented in that settlement was fixed at 46 cents per hour.

THIS COURT MAY DETERMINE WHETHER THE RESPONDENT MAY MAKE ITSELF THE RECIPIENT OF TIPS, AND NO PRIOR RULING BY THE INTERSTATE COMMERCE COMMISSION IS NECESSARY.

Respondent endeavors to dispose of petitioner's point that respondent cannot claim ownership of the tips received by the redcaps because by so doing it would be charging or receiving from one passenger more than it does from another for the same or similar service, in violation of Section 2 of the Interstate Commerce Act, and that a carrier cannot be the recipient of tips or gratuities, by saying that the Court cannot consider this argument until there has first been a ruling thereon by the Interstate Commerce Commission. It cites a number of cases which it contends sustain its position. A reading of these cases discloses, however, that the only cases in which there must first be a ruling by the Interstate Commerce Commission are those cases which involve rate making or the determination of whether a certain service is included in a certain rate and the like, where a ruling by the Interstate Commerce Commission is necessary to preserve uniformity, and to prevent discrimination because one court might hold that a certain service was included in a certain rate and another court might hold to the contrary. There is no necessity for the Interstate Commerce Commission first passing on a matter where the Interstate Commerce Law

is clear and requires no ruling by the Commission. This was recognized by this Court in the case of Pennsylvania Railroad Company v. International Coal Mining Company, 230 U. S. 184, 57 L. Ed. 1446. In this case the International Coal Mining Company sued the Pennsylvania Railroad Company for $37,268.00, being the difference between the rates paid by plaintiff and lower rates resulting from rebates allowed other coal dealers making like shipments over the same road from the same point to the same destination. The defendant contended that the case should be remanded with instructions to dismiss the complaint on the ground that courts had no power to adjudicate the administrative question as to whether a carrier could make a difference in rate between shipments of free and contract coal. It argued that this was a rate-making question, and that it was for the Interstate Commerce Commission as the rate regulating body to determine, not only whether a dissimilarity existed, but whether the rates were properly adjusted to meet that dissimilarity. In disposing of this question the Court said (230 U. S., l. c. 196, 197, 57 L. Ed., l. c. 1451):

> "Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions, are not matters of law. So far as the determination depends upon facts, no jurisdiction to pass upon the administrative questions involved has been conferred upon the courts. That power has been vested in a single body, so as to secure uniformity and to prevent the varying and sometimes conflicting results that would flow from the different views of the same facts that might be taken by different tribunals.

"None of these considerations, however, operates to defeat the courts' jurisdiction in the present case. For even if a difference in rates could be made between free and contract coal, none was made in the only way in which it could have been lawfully done. The published tariffs made no distinction between contract coal and free coal, but named one rate for all alike. That being true, only that single rate could be charged. When collected it was unlawful, under any pretense or for any cause, however equitable or liberal, to pay part back to one shipper or to every shipper. * * *

"In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. **It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class.**" (Emphasis ours.)

The Court in a similar case, Mitchell Coal Company v. Pennsylvania Railroad Company, 230 U. S. 247, l. c. 266, 57 L. Ed. 1472, l. c. 1480, said:

"The so-called allowance, regardless of the amount, was a mere gift—a rebate, absolutely forbidden by the statute and ipso facto illegal. **Being an act prohibited by law, it was not necessary to have any preliminary decision to that effect by the Commission, but the courts could, as in any other case, apply the law to the facts proven and award damages to the person injured.**"

The case at bar falls within the principle laid down by

this Court in the Pennsylvania Railroad Company cases, for it is well known, and the Court should take judicial notice of the fact, that there is no uniformity in the amount of tips given by passengers for the same or similar service, and the Interstate Commerce Law plainly provides that charges must be uniform for the same or similar service. There is no finding the Interstate Commerce Commission could make in this case which could justify or excuse the respondent's charging more of one passenger than of another for the same or similar redcap service, or by any device attempting to make itself the recipient of tips or gratuities given its employees.

RESPONDENT'S RELIANCE ON THE ACCOUNTING AND GUARANTY PLAN NECESSITATES THIS COURT'S DETERMINING WHETHER A COMMON CARRIER CAN LEGALLY MAKE ITSELF THE RECIPIENT OF TIPS.

Respondent attempts to eliminate the Interstate Commerce Act points from the case, saying that the redcaps are in no position to raise these questions because any complaint must come from some person affected, such as the passengers. This is not a case, however, where petitioner or the redcaps are coming into court and asking any **affirmative** action of the Court outlawing an arrangement requiring the redcaps to turn over their tips, but, instead, respondent is asking the Court to put its stamp of approval on the legality of the accounting and guaranty arrangement under which it contends that it was making a charge for redcap service in the form of tips, admittedly not uniform, and by which it contends it became the owner and recipient of these tips. If the Court holds this arrangement legal it will necessarily have to disregard the plain terms of Section 2 of the Interstate Commerce Act, because it will have to hold that a common carrier may be the recipient of tips,

and that respondent may make a charge for redcap service in the form of tips, even though the charges are not uniform in amount. The necessity for the Court passing on this question is brought into the case by respondent's contention that the tips were its charges for redcap service, and that it could and did become the owner of these tips, and clearly petitioner has the right to contend that the arrangement is illegal under the above referred to sections of the Interstate Commerce Act.

FALLACY OF RESPONDENT'S ARGUMENT THAT IF PETITIONER'S CONTENTIONS WITH RESPECT TO THE RAILWAY LABOR ACT ARE CORRECT RESPONDENT COULD NOT COMPLY WITH THE FAIR LABOR STANDARDS ACT WITHOUT VIOLATING THE RAILWAY LABOR ACT.

On page 49 of its brief respondent says:

> "The Fair Labor Standards Act became effective on October 24, 1938. Respondent was required to comply with its terms or subject itself to the very stringent criminal penalties of the Act. But Petitioner argues that Respondent could not comply with the Fair Labor Standards Act because a compliance would mean a change in rate of pay or manner of payment, which, according to Petitioner, would be a violation of the Railway Labor Act. So, if this proposition of Petitioner be correct, Respondent could not have complied with the Fair Labor Standards Act even by a notice to the redcaps (presumably unless preceded by some action in response to Petitioner's letter of October 11) that beginning October 24, 1938, the redcaps would be paid 25 cents an hour, because such action would have been in violation of the Railway Labor Act, and, therefore, void."

Petitioner submits that this argument of respondent is based on a misconception of petitioner's position. We do not say, as respondent seems to think, that respondent

could not have commenced paying a wage of 25 cents an hour to the redcaps, as required by the Fair Labor Standards Act, without first entering into negotiations with the petitioner as their duly designated representative in an effort to make this change in the existing arrangement under which the redcaps were working. This change requiring respondent to pay to each of its employees engaged in interstate commerce, including its redcaps, a minimum wage of 25 cents an hour was made by the Fair Labor Standards Act, and required no agreement between the parties to become effective. The only subject for negotiation between respondent and petitioner, as representative of the redcaps, was whether respondent could appropriate the tips received by the redcaps to itself, and use these tips to satisfy its obligation to pay a wage under the Fair Labor Standards Act.

Respondent's duty under both the Fair Labor Standards Act and the Railway Labor Act under the situation existing on October 22, 1938, was clear. Prior to that date redcaps had been held to be employees of the carriers by the Interstate Commerce Commission, and respondent's redcaps had by more than a majority duly designated the petitioner as their representative for collective bargaining purposes under the Railway Labor Act. The Fair Labor Standards Act was to become effective October 24, 1938, and imposed the obligation on respondent of paying its redcaps a minimum wage of 25 cents per hour. If respondent desired to change the existing arrangement under which the tips were the property of the redcaps so as to invest itself with ownership of the tips, and thereby use them for the payment of the statutory minimum wage, it should have arranged to pay out of its own funds the wages required to be paid by the Fair Labor Standards Act, and it would then have been in a position to say to petitioner as the representative of the redcaps, "We think the tip

money should be turned over to us, and we propose a conference under the provisions of the Railway Labor Act to undertake to decide whether the redcaps shall keep all the tip money or whether the redcaps shall turn over the tip money to us, at least to the extent of the minimum wage we are required to pay them." In the meantime, however, respondent should have been paying the 25 cents an hour out of its own funds. In the event no agreement could have been reached in conference between the parties as to the ownership or application of the tips received by the redcaps, machinery is provided for in the Railway Labor Act by the use of which this issue could have been disposed of. Instead of doing what the Railway Labor Act commands, however, respondent undertook to treat with the redcaps individually, by serving on them the notices of October 22, 1938.

It is clear, therefore, that respondent could have complied with the Fair Labor Standards Act without violating the Railway Labor Act, and equally clear that respondent has failed to comply with either act.

THE IMPOSITION OF LIQUIDATED DAMAGES IS MANDATORY UNDER SECTION 16 (b) OF THE FAIR LABOR STANDARDS ACT.

Respondent's sixth point is that the trial court erred in awarding liquidated damages in addition to the wages which it found to be due, saying that liquidated damages are not recoverable under Section 16 (b) of the Fair Labor Standards Act in the absence of a showing of fraud, malice, willful violation of the law or gross negligence, and that there was no such showing in this case. Respondent deliberately, after the consideration of a number of plans of compliance with the Act, adopted the accounting and guarantee plan. Respondent, of course, must have known that it was taking a chance on the plan being held

to be a compliance with the Act, and yet it chose this plan in preference to others for reasons of its own, although there would have been no question whatsoever about the legality of other plans which it might have adopted. Furthermore, it is apparent from the fact that the notices served by other carriers throughout the country are identical in form that the carriers acted concertedly in an attempt to evade the burden imposed up them under the Act to pay the minimum wages provided for therein. Respondent was put on notice by petitioner's letter of October 24, 1938, that its redcaps would contend that the accounting and guarantee plan was not a compliance with the Act, and, therefore, it was not misled, but with such notice it determined to take its chance on the plan being held a compliance with the Act. We submit that under these circumstances the imposition of liquidated damages under Section 16 (b) of the Act would be warranted, even though it should be construed as respondent contends.

It is petitioner's position, however, that the imposition of liquidated damages under Section 16 (b) of the Act is mandatory in the event of a finding for wages, and that it is not necessary that the employer be guilty of bad faith before liquidated damages may be awarded. The pertinent part of this section reads as follows:

> "(b) Any employer who violates the provisions of section 206 or section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

This provision contains no language which would limit its operation to willful, intentional and deliberate violation of the provisions of sections 6 or 7 of the act, or to cases where it is shown that the employer is guilty of bad faith.

In this respect it differs from section 16 (a) of the act, the immediately preceding section which provides a criminal penalty for violation of the act, but limits such criminal penalties to persons who "willfully violate" the act. Thus section 16 (a) reads:

> "(a) Any person who willfully violates any of the provisions of section 215 shall, upon conviction thereof, be subject to fine of not more than $10,000.00," etc.

The omission of the word "willfully" from section 16 (b) is significant, and is indicative of the purpose of the Congress to make the assessment of liquidated damages mandatory. This is in keeping with the Congress' evident intention, as we have heretofore shown, that the act be strictly enforced. The Congress undoubtedly felt that if employers who desired to evade the act knew that even if they forced their employes to go to court and fight for their rights, the worst that could happen would be that judgment would be entered for the amount of wages, there would be no end to the litigation which the employers would force upon employees in order to discourage them from enforcing their rights. If an employer, however, is faced with the certainty that he will have to pay double if he does not obey the law, he will think twice before failing to comply with its provisions.

In all the decisions we have been able to find of the trial courts in actions instituted under Section 16 (b) of the Act, liquidated damages have been awarded in addition to the wages due, and in those cases where the question has been raised, the courts have ruled that liquidated damages must be awarded even though there is no showing of bad faith on the part of the employer. So far as we know, no appellate court has ruled on the point. In addition to the case at bar, in which Judge Atwell held that the imposition of liquidated damages was mandatory, and the Jacksonville Terminal case, the opinion in which discloses that

Judge Waller apparently felt the same way, the courts have held that the assessment of liquidated damages is mandatory in the cases of Harrison v. Kansas City Terminal Railway Company; 36 F. Supp. 434 (decided by the U. S. District Court for the Western District of Missouri), Emerson v. Mary Lincoln Candies, Inc., 17 N. Y. Supp. (2d) 851, 173 Misc. 531 (decided by the New York Supreme Court for Erie County), Reeves v. Howard County Refining Company, 33 F. Supp. 90, l. c. 92 (decided by the U. S. District Court for the Northern District of Texas), and Lefevers v. General Export Iron and Metal Company, 36 F. Supp. 838 (decided by the U. S. District Court for the Southern District of Texas), Eichorn v. Kilkenny (Com. Pl. Passaic County, N. J.), 1940 Wage & Hour Manual 354, Floyd v. Dubois Soap Co. (Com. Pl. Hamilton County, Ohio), 4 W. H. R. 77, Abroe v. Lindsay (Municipal Court, Minneapolis, Minn.), 4 W. H. R. 38, Magann v. Long's Baggage Transfer Co. (U. S. District Court, Western District of Virginia), 39 F. Supp. 742, McMillan v. Wilson & Co., Inc., et al. (Minnesota District Court, Ramsey County), 4 W. H. R. 409, Williams et al. v. General Mills, Inc. (U. S. District Court, Northern District of Ohio), 39 F. Supp. 849, Thompson v. Dougherty (U. S. District Court, District of Maryland), 40 F. Supp. 279, Reck v. Zarnocay (New York Supreme Court, N. Y. County), 4 W. H. R. 344, and Haddad v. Beckerman Shoe Corp. (Pa. Court of Com. Pl.), 4 W. H. R. 329.

In the Emerson case the Court, in answer to defendant's contention that since, when it found after an investigation by the United States Department of Labor that it owed plaintiff wages for overtime, it offered to pay the amount to plaintiff, it was not liable for liquidated damages, said:

> "We note that Section 16 (a) imposes criminal penalties for willful violations, while Section 16 (b) provides for the recovery of the additional moneys for any

violation, willful or not. Compare the statute above referred to, which gives a seaman extra wages if not paid in time (46 U. S. C. 596). Congress, in that statute enacted that the additional amount was to be recovered by the employee only if the failure to pay was 'without sufficient cause.' (See Collie v. Fergusson, 281 U. S. 52, 55.) No such limitation is found in the act we are considering here and we cannot write one in. Apparently the failure to pay the mandated overtime gives rise to liability under 16 (b) forthwith. The defense is therefore insufficient."

In the Reeves case Judge Davidson held that the plain, unambiguous provisions of the Fair Labor Standards Act imposing liquidated damages on employers for violation of the Act must be applied by the courts as written, since it is the prerogative of the Congress, and not of the courts, to shape the public policy of the nation, and Judge Allred in the Lefevers case held likewise, saying:

"Defendant, seeking to evade the assessment of an amount equal to the unpaid minimum wages and overtime compensation, pleads its own good faith and unintentional violation of the act; and tenders payment of the actual amount due. About the time plaintiff left defendant's service, or shortly thereafter, defendant was advised by a representative of the Wage and Hour Division that plaintiff was entitled to the benefits of the act. At that time defendant expressed its willingness to pay whatever amount was found by such representative to be due plaintiff under the act; but defendant never actually tendered any particular amount to plaintiff.

"(Conclusion.)

"I find nothing in the act relieving an employer from this liability under such circumstances. Sec. 216 (b) provides that any employer who violates this law shall be liable, not only for the unpaid minimum wages and unpaid overtime, but for 'an additional equal amount as liquidated damages' and for reasonable attorneys' fees.

"Judgment will be for plaintiff for the sum of $882.44, the amount due him as unpaid minimum wages and overtime compensation, and an equal amount as liquidated damages; plus a reasonable attorney's fee of $200.00; or a total of $1,964.88."

Respondent has cited no cases arising under the Fair Labor Standards Act holding that liquidated damages can only be assessed under Section 16 (b) where there is a showing of bad faith on the part of the employer, but relies on other cases which are not in point, and are easily distinguishable. The cases of Scott v. Donald, 165 U. S. 48, 41 L. Ed. 632, and Tinker v. Scharnhorst, 129 Okla. 118, 263 Pac. 645, were cases in which the circumstances necessary to the imposition of punitive or exemplary damages in an action in tort were discussed, and are, of course, not applicable here. The holding of the Court in the case of Tilghman v. Proctor, 125 U. S. 136, 31 L. Ed. 664, a patent case, that the Court might whenever the circumstances of the case appeared to require it, inflict vindictive or punitive damages by rendering judgment for not more than thrice the amount of the verdict is distinguishable because the section of the patent statutes there construed, now 35 U. S. C. A., Section 67, reads:

"The Court **may** enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, **according to the circumstances of the case**, not exceeding three times the amount of such verdict." (Emphasis ours.)

We submit that the uniform construction which the trial courts have so far put on Section 16 (b) of the Act is correct, and that the trial court did not err in awarding liquidated damages in addition to the wages due.

Respectfully submitted,

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No. 1023 (October Term, 1940)

In the

Supreme Court of the United States

OCTOBER TERM, 1941

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT

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WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas, Texas — Central-4091

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THE UNION TERMINAL COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

This suit was instituted by Petitioner on behalf of a group of Respondent's employees commonly known as red caps. The suit was based on Section 16(b) of the Fair Labor Standards Act of 1938 (hereinafter referred to as the Act) and sought recovery of $38,626.99 covering alleged unpaid wages, together with an additional $38,626.99 as liquidated damages.

Substantially all of the essential facts were agreed upon, the case being submitted largely upon a stipulation entered into by the parties.

For many years prior to the passage of the Act, Respondent had red caps on its premises to handle baggage and otherwise to assist passengers and other persons using the premises owned by Respondent. The red caps received payment in the form of so-called "tips".* They were permitted by Respondent to retain these tips and were not required to account for them.

The Fair Labor Standards Act became effective on October 24, 1938. Section 6 of the Act required the payment to employees of certain minimum wages. On October 22, 1938 Respondent delivered to each of the red caps then employed by it (including all red caps represented in this suit) a notice in the following form:

"Dallas, Texas, October 22, 1938.

"To: Red Caps,
The Union Terminal Company.

"In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amount received by you as tips or remuneration for such services.

"The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.

"You are privileged to retain subject to their being credited on such guarantee all such tips or remunera-

* The word "tips" is used throughout this brief as a convenient term to designate the sums of money received by red caps from passengers for services rendered in handling hand baggage.

tion received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

"All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

THE UNION TERMINAL COMPANY,

By Murrell L. Buckner,
Vice-President and General Manager."

(Transcript of Record, p. 127.)

Under date of October 24, 1938, A. J. Pickett, representing the union to which the red caps belong, wrote the following letter to Respondent:

"October 24, 1938.

"Mr. Murrell L. Buckner,
Vice-President and General Manager,
The Union Terminal Company,
Dallas, Texas.

"Dear Sir:

"I have a copy of a circular issued by your company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed; i.e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he received in tips from the public and which information the carrier intends to employ, in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act:

"In other words, the carrier contemplates crediting tips and other moneys paid to its employees by per-

sons other than itself to relieve itself of the obligations imposed by the following quoted section of the law:

"FAIR LABOR STANDARDS ACT:

"Section 6-(a). Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—(1) during the first year from the effective date of this section, not less than 25 cents an hour.

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each of his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby.

"This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under the said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the administrator, we are accordingly filing this notice of protest, for the reasons set forth herein.

Yours truly,

(Signed) A. J. PICKETT,
General Chairman."

(Transcript of Record, p. 128.)

On October 24, 1938 and thereafter the red caps who had been served with the notice of October 22nd continued to engage in the work of handling hand baggage as employees of Respondent upon Respondent's premises. They

reported to Respondent the tips received from passengers as required under the notice of October 22nd; and in keeping with the terms of such notice they retained such tips and were credited therefor under the guarantee arrangement set forth in the notice. In every instance when the tips did not equal or exceed the minimum wage, the red caps received a check from Respondent covering any difference.

The parties stipulated that during each work period covered by this suit the red caps received sums equal to or greater than the minimum wage, and a total sum greater than the $38,626.99 sued for herein as alleged unpaid wages. Petitioner claims however that Respondent's action of October 22, 1938 was not a compliance with the Fair Labor Standards Act and that the red caps are entitled to a second $38,626.99 as wages and a third $38,626.99 as liquidated damages. The trial court entered judgment in behalf of Petitioner, which judgment was reversed by the Circuit Court, the latter holding that the red caps had been fully paid under the Act [118 F. (2d) 328].

(In the quotations appearing throughout this brief emphasis is supplied by us unless otherwise noted.)

POINT I

When payment for services performed by an employee is made in the form of tips, the employer has the legal right to control such tips and to require that they be turned over to him or be applied to discharge his obligations.

Summary of Argument in Support of Point I

Prior to October 22, 1938, red caps were permitted by Respondent to work on its premises and retain unconditionally tips received for services rendered. The Fair Labor Standards Act was to become effective on October 24, 1938. On October 22nd, Respondent notified its employees that they would be guaranteed the minimum wage under the Act, but that all payments in the form of tips received for services performed by employees who continued to work for Respondent on and after October 24th must be reported to Respondent and applied on the guaranteed minimum, and that such employees would be paid any difference between the tips reported and the minimum wage. The red caps, who thereafter continued to work for Respondent, reporting tips and receiving checks covering any difference, challenge the legality of Respondent's action of October 22nd.

The legal right of an employer to exercise ownership over tips received by employees in payment for services rendered by such employer through his employees has never been successfully questioned in any court. The situation involved is similar to the familiar one of a hotel operating a hat check room on a tip basis. No court has ever questioned the right of a hotel to employ workers in such hat check rooms and to require all tips received to be paid

over to the hotel. Whether the wage of such employee be paid out of the general funds of the hotel or out of the tips received is of no consequence in so far as the legal right of the employer to adopt such plan is concerned. An agreement on the part of an employee that the employer may thus exercise control and ownership over tips is wholly unnecessary.

The services performed by Respondent's employees were services rendered passengers by Respondent through its red cap employees. Whether the compensation for the service thus rendered by Respondent was in the form of a fixed charge or in the form of tips, such compensation belonged to Respondent in the absence of an agreement on its part permitting its employees to retain such compensation or some part thereof. There is nothing in the Fair Labor Standards Act which prohibits an employer from having and exercising the control of all income derived from the prosecution of its business, and nothing which gives an employee the right to convert to his own use funds coming into his hands in the course of his employment and paid to him for services rendered by his employer through him. Prior to October 22nd Respondent had consented to the unconditional retention by the red caps of such compensation. The notice of October 22nd withdrew this prior consent, and thereafter all tips to the extent necessary to pay the minimum wage belonged to Respondent.

Respondent could have required the manual delivery of tips to it (just as it could have required that no tips be accepted), and then out of the tips so delivered to it, could have paid to its red cap employees their wages; or it could

have required all tips to be placed in a central box or safe and wages to be drawn therefrom at the end of each week. Respondent's requirement that tips be reported and applied on payment of wages brought about the identical result. Manual delivery and re-delivery of tips would have been superfluous, and would merely have deprived the red caps of the current use of their wages.

It is stipulated in the record that through tips collected and reported plus payment of deficiencies, every red cap received amounts equal to or greater than the minimum wage. The law does not entitle them to anything more.

POINT II

When an offer of employment is made upon clearly stated terms, and an employee, knowing such terms, goes to work or continues to work thereafter, his action in so working is an acceptance of such proffered terms and he is bound thereby.

Summary of Argument under Point II

The trial court held that Respondent's notice of October 22, 1938 was an offer of employment under terms differing from those theretofore existing; that the Union representative of the red caps wrote Respondent on October 24, 1938 refusing to accept the revised terms, and that therefore no new contract of employment was made and the agreement theretofore existing continued in effect.

Respondent submits: (1) that the letter of October 24, 1938 amounted merely to an expression of opinion by the Union representative that the terms of Respondent's no-

tice of October 22nd would not be a compliance with the Fair Labor Standards Act, and such letter did not even purport to be a rejection of employment under those terms; and (2) that even if the letter of October 24th could be construed as a rejection of employment under the terms contained in the notice of October 22nd, no terms except those contained in such notice were offered the red caps and they went to work and continued to work in full compliance with such terms, and their action in working on and after October 24, 1938 was controlling and was an acceptance of the only terms of employment offered them.

In the letter of October 24th, the Union representative first summarized the notice of October 22nd, then quoted from the provisions of the Fair Labor Standards Act and concluded with the statement that he was protesting against the notice because it was not a compliance with the Act. This was purely an expression of his opinion. If his opinion was correct, he did not even need to express it, because Respondent had to comply with the Act. If his opinion was incorrect and Respondent's action was a compliance with the Act, the expression of such incorrect opinion could not affect the situation in any way.

Even if the letter of October 24th had said in simple language: "We refuse to accept the terms of employment offered in the October 22nd notice and decline to work thereunder," no other terms of employment were offered by Respondent, and on October 24th and thereafter the red caps continued to work, reported tips on forms furnished them, accepted Respondent's checks covering differences between tips reported and the minimum wage, and otherwise complied fully with Respondent's notice.

Such action on the part of the red caps is controlling regardless of what may have been written on October 24th.

Petitioner cites no case contrary to the authorities which support the position of Respondent. Instead he contends that there was no contract because Respondent in this case recognized from time to time that the courts would ultimately pass upon the question of whether or not Respondent's action complied with the Fair Labor Standards Act. The courts have passed on the question and this court will pass on the question; but contracts are not invalidated by virtue of the fact that courts have jurisdiction to pass upon and construe them.

POINT III

Nothing in the Railway Labor Act or Interstate Commerce Act operates to nullify the effectiveness of Respondent's notice of October 22, 1938.

Summary of Argument under Point III

(A) Petitioner argues that the terms of Respondent's notice of October 22, 1938 were ineffective and void due to the fact that Petitioner had written Respondent on October 11, 1938 suggesting a conference for the purpose of negotiating a working agreement. Petitioner states that after receipt of the letter of October 11, 1938, Respondent was required by the Railway Labor Act to exert reasonable effort to negotiate an agreement and that Respondent could not by its action of October 22, 1938 make a change in the red caps' wage situation.

Petitioner offered no proof of any failure on the part of Respondent to exert whatever effort is required under the Railway Labor Act to negotiate an agreement. Such few facts as are in the record reflect that the parties exchanged various communications and did reach an agreement, although neither party undertook to have a wage scale included in the contract.

Nothing in the Railway Labor Act (which provides its own remedies) prohibits a carrier from complying with other laws such as the Fair Labor Standards Act. As the latter Act became effective October 24, 1938, it was necessary that Respondent, on pain of both civil and criminal penalties, take steps to comply with the Act. Consequently Respondent's action of October 22, 1938 was not only justified but required.

Petitioner made no claim in the trial court that Respondent had violated the Railway Labor Act, and can not make such a claim for the first time on appeal.

(B) The Petitioner argues that the effect of Respondent's notice of October 22, 1938 was to make a charge against passengers; that under the Interstate Commerce Act all charges must be uniform and must be published with the Commission; that the notice of October 22nd did not comply with this requirement of the Interstate Commerce Act and was therefore void.

Questions concerning the uniformity of rates, the publication thereof, and similar questions must be submitted to the Interstate Commerce Commission before a court of law can obtain jurisdiction over them.

Petitioner argues in effect that the money with which Respondent paid red cap wages was obtained illegally because it was a charge not authorized by the Interstate Commerce Commission and that, therefore, Respondent must pay the red caps again out of other funds legally obtained. If a passenger has paid illegal charges, it is within his power to complain before the proper body; but a red cap who has been paid wages out of such monies is in no position to claim additional wages.

POINT IV

The Terms of Employment contained in Respondent's notice of October 22, 1938, were in full compliance with both purpose and language of the Fair Labor Standards Act.

Summary of Argument under Point IV

The purpose of the Fair Labor Standards Act set forth in Section 2 thereof is to maintain a "minimum standard of living necessary for the health, efficiency and general well being of workers." This purpose was fully complied with under Respondent's notice of October 22, 1938, which guaranteed to Respondent's employees the wage which Congress said would maintain the desired minimum standard of living.

Since under its notice of October 22, 1938, Respondent exercised its right of control and ownership over tips paid to red caps for services performed by Respondent, it paid wages to the red caps by permitting them to retain such tips and paying them the difference between the tips received and the minimum wage. The word "pay" is uniform-

ly defined as the act of compensating, remunerating or discharging one's obligation. Under the terms of the notice of October 22, 1938 Respondent compensated, remunerated and discharged its obligation to the red caps.

Section 3(m) of the Fair Labor Standards Act purports to deal only with a situation in which an employee is paid wages in something other than cash. The "tips" involved herein are cash payments and are, therefore, in no way affected by Section 3(m).

Unless specifically excluded by the terms of a statute, the courts have included tips in the term "wages" in construing other social legislation.

POINT V

There was no abandonment of the accounting and guarantee plan by Respondent during the period from March 1, 1939, to October 15, 1939, as claimed by Petitioner under his Point V.

Summary of Argument under Point V

Respondent did not abandon the accounting and guarantee plan between March 1, 1939 and October 15, 1939 but simply adopted new forms of reports for use in carrying out such accounting and guarantee plan. It was stipulated by the parties in the trial court that from October 24, 1938 through October 23, 1939 Respondent "stood ready to and did pay to each red cap for each work period during which the amount of tips collected by said red cap amounted to less than the number of hours worked multiplied by 25¢, an amount equal to the difference, etc." The

period March 1, 1939 to October 15, 1939 is covered by the quoted stipulation.

POINT VI

Liquidated or punitive damages are not recoverable in the absence of a showing of fraud, malice, willful violation of the law, or gross negligence; and there being no such showing herein, no recovery of liquidated damages can be had.

Summary of Argument under Point VI

The trial court erred in proceeding upon the theory that the penalties provided for under Section 16(b) of the Act are mandatory under the statute. Under the holdings of this Court, punitive damages should not be allowed in the absence of malice or fraud. No showing of malice or fraud was made in this case.

POINT I

When payment for services performed by an employee is made in the form of tips, the employer has the legal right to control such tips and to require that they be turned over to him or be applied to discharge his obligations.

Authorities in Support of Point I

Bryant v. Pullman Company, 177 N. Y. S. 488;
Corpus Juris, Volume 39, page 125;
Gross' case, 166 A. 55;
Harrison v. Kansas City Terminal Ry. Co., 36 F. Supp. 434;
Harrison v. Terminal Railroad Association of St. Louis (Unreported);
Labatt's Master and Servant, 2nd Edition, Volume 5, page 6322;
Morison v. Thompson, L. R., 9 Q. B. 480;
Pickett v. Union Terminal Co., 33 F. Supp. 244;
Polites v. Barlin, 149 S. W. 828;
Ryan v. Denver Union Terminal Co. (Unreported);
Sloat v. Rochester Taxicab Co., 163 N. Y. S. 904;
Taylor v. Pennsylvania-Reading Seashore Lines (Unreported);
Williams v. Jacksonville Terminal Co., 35 F. Supp. 267;
Williams v. Jacksonville Terminal Co., 118 F. (2d) 324;
Zappas v. Roumeliote, 137 N. W. 935.

Argument in Support of Point I

Througs its notice of October 22, 1938 (pages 2-3 herein), Respondent notified its red cap employees that under the Fair Labor Standards Act it was required to pay such

employees a minimum wage; that in order to do so it was exercising its legal right of control and ownership over tips; that it guaranteed to the red caps who thereafter wished to continue in its employ the minimum wage, but required that all tips be reported to it and be applied against such guarantee; that it would pay to its employees any difference between the tips reported and the guaranteed minimum wage; that the plan as outlined would become effective on October 24, 1938, and would apply to all red caps thereafter continuing in its employ. After October 24th, the red caps did continue in Respondent's employ, received and reported tips, and were paid the difference when the tips reported fell short of the minimum wage.

The right of Respondent to prescribe such conditions of employment and under them to assume the control and ownership of tips is challenged by this suit of Petitioner. It is Respondent's position that by this notice of October 22, 1938, Respondent directed its employees with reference to the manner of handling the income accruing from the services rendered by Respondent to its patrons, and that such direction was final, with or without an acceptance or agreement upon the part of its employees.

This suit is bottomed squarely upon the fact that the red caps are employees of Respondent. If they are not employees, then Respondent certainly does not owe them any wages. The liability sought to be imposed upon Respondent is by virtue of the fact that it is the employer and has employed these red caps to work for it. The character of the work that they do is carrying hand baggage and rendering assistance to passengers using the station of Re-

spondent. The red caps contend that they are employees and that they perform that service for and on behalf of Respondent as their employer. They therefore contend that Respondent, through them as its employees, performs such service of carrying baggage and otherwise assisting passengers. They contend that in connection with the performance of that service by Respondent, through them as its employees, persons receiving such service pay therefor sums of money commonly termed "tips." They do not contend that any other consideration is paid to Respondent or that these "tips" are paid to the red caps over and above any other charge paid to Respondent, or for any reason other than that the persons making such payment have received a service performed by Respondent.

It has long been recognized that compensation or consideration received by a servant or employee for the services performed by him in the course of his employment, belong, in the absence of an agreement to the contrary, to the master or employer and not to the servant or employee. In the early case of **Morison v. Thompson,** L. R., 9 Q. B. 480, the court, citing other English decisions to the same effect, laid down the proposition:

> "Profits acquired by the servant or agent in the course of or in connection with his service to the agency, belong to the master or principal."

Corpus Juris (Volume 39, p. 125) states the rule as follows:

> **"Earnings from Third Persons.** * * * even in the absence of a statutory provison, the earnings of an employee in the course of, or in connection with, his services belong to the master." (Citing numerous authorities.)

In **Labatt's Master and Servant**, 2nd Edition, Volume 5, in discussing the matter of the ownership of tips, the following comment is made (p. 6322):

> "The true doctrine seems to be that the right of servants to retain gratuities given by third persons must rest, in the last analysis, upon the consent of their masters, and that a claim founded upon the existence of such a right canot be supported unless that consent is established by proof of a usage known to the master or by other suitable evidence."*

It will be borne in mind that in the instant case the so-called "tips" form the **sole** consideration paid for the service performed by Respondent through its employees. In the light of the established law relative to the right of control and ownership by the master of the income from services performed by him through his servant, Respondent, through its notice of October 22, 1938, in effect said to the red caps:

(1) That as your employer, if you continue in our employ, we have the legal right to set and prescribe for the future your hours of work and rate of pay so long as your wages are not less than 25¢ an hour; and we also have the legal right to control and supervise you in the means, method and manner in which you shall do our work.

(2) That, if you work for us in the future, and we pay you to do this work for us, your efforts belong to us and the work you do or service you perform is done and performed by us; that when we perform a service through our employees we are entitled in law, equity and fair deal-

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* For the purposes of Respondent's Point I we are not concerned with personal gratuities given **over and above** a fixed charge of an employer, although this comment of Labatt's was made in connection with such **a case**.

ing to the income to be derived from such service performed by us.

(3) That the general public has recognized in the past that it is not entitled to receive red cap service without paying for it, and such payment has customarily been made by passengers in the form of "tips"; that you will continue to accept payment for the service in the form of tips, which, since we are guaranteeing you a minimum wage, will hereafter belong to us, and you will collect them for us, and when you do so they will be in our possession constructively, because they are paid for services rendered by us through you and you must account to us for them.

(4) That periodically you will owe us so much money and we will owe you so much money, and upon accounting the funds collected by you for the service performed by us will be released from our constructive possession to the unconditional ownership of the red caps and same will be released as payment of wages.

There was no necessity for an acceptance by the red caps of the foregoing directions from their employer. The employer had the right to the income from services rendered by it, and had the right to set up the mechanics for its collection and accounting. Respondent surely had the right to direct its employee red caps on October 22, 1938, that if they continued to work for Respondent they must collect and charge 10¢ per hand bag carried by them and must turn in such collection to Respondent. Similarly Respondent had the right to direct its red cap employees on October 22, 1938, that if they continued to work for Respondent they must turn in to Respondent all payments received by them in the form of tips for carrying hand-

bags. The exercise of this right by employers is widespread and has never been successfully challenged in any court. The practice of hotels in the handling of hat check business is a most familiar illustration of the exercise of such right. Surely it will not be questioned that a hotel has the right to direct its employees in charge of a hat check counter to collect 10¢ for every hat checked and to turn such collections over to the hotel, or that it likewise has the right to direct its employees in charge of a hat check counter to accept payment for the checking service in the form of tips and to turn such tips over to the hotel, in consideration for which work such hotel could at its option pay a fixed wage or a percentage of the tips collected. Such tips collected at the check rooms of large hotels undoubtedly add up to very large sums in the course of a day's business. Can it be seriously suggested that it would be illegal for a hotel to hire an employee with directions to turn in to the hotel 75% of all tips collected but to retain 25% of such tips as his wage? If the 25% is less than the minimum fixed by law, then the hotel has a further obligation, but only in that event. The service of checking hats is rendered the patrons of the hotel by the hotel itself acting through its employees, just as red cap service is rendered the patrons of Respondent by Respondent itself acting through its red cap employees. The hotel is responsible for the conduct of its employees in the performance of the service and likewise Respondent is responsible for the conduct of the red caps. In each instance the sole income of the employer from the service rendered consists of tips paid by its patrons. The direction either by the hotel or by Respondent to its employees concerning the manner in which the

income from the service rendered should be handled requires no acceptance by such employees.

Respondent had the right to prohibit tipping on its premises, if it so desired. That would have been only an extension of the power and the right which it had exercised, without question, to prohibit the red caps from actively soliciting tips or insisting upon the payment of tips. It is therefore equally true that Respondent could attach conditions to the receipt and retention of tips. That was exactly what Respondent did in this case. There is nothing in the Fair Labor Standards Act or any other law which prohibits an employer from having the ownership of and exercising the control of all income derived from the prosecution of its business. There is nothing in the Act which compels an employer to continue in force any contracts theretofore existing pertaining to the employer's property, to-wit, the income from its business. There is nothing in the Act requiring employees to continue in past employment beyond the effective date of the Act, and there is nothing in the Act requiring employers to continue any particular employees in its employment after the effective date. There is nothing in the Act which gives an employee the right to convert to himself, to the exclusion of his employer, funds coming into his hands, received by him in the course of his employment and paid to him for the services rendered by his employer through him. There being nothing in the Act prohibiting the exercise of control over tips by an employer as a condition of employment, the exercise of such control was a matter of simple common law right.

In the case of **Geo. M. Harrison v. Kansas City Terminal Ry. Co.**, 36 F. Supp. 434, Judge Merrill Otis, sitting in the District Court of the United States for the Western District of Missouri, held against the red caps who had sued the Kansas City Terminal for double wages under the Fair Labor Standards Act. Judge Otis considered what the situation would have been had the Terminal Company directed the red caps to turn all tips in to it and then paid the red caps the minimum wage, his language (dealing with what he termed "Assumption No. 2") being:

> "Defendant was under no obligation to employ red caps. In the great majority of railway stations no such service is provided. When the defendant did employ red caps it had the right to fix the conditions of their employment (except as Congress legally may have prescribed conditions). It had the right to say what duties they should perform, how they should perform them, when they should perform them. It had the right to say whether they should take or refuse tips when offered. It had the right to require them to turn over to it all tips received.* Having these several rights, clearly the defendant might have done this—and so have complied fully with the Fair Labor Standards Act—it might have paid to every red cap in cash the minimum wage required by law, reimbursing itself out of the tips turned in. If the situation thus hypothesized were that presented in this case plaintiff could not prevail."

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* At this point Judge Otis inserted the footnote: "The statement made here is not questioned but, on the contrary, is asserted by defendant and impliedly admitted by plaintiff. (The plaintiff in the Kansas City case was represented by the same attorneys as petitioner in the instant case.) Cases which may be read in this connection are **Gross' case (Me.)**, 166 A. 55; **Sloat v. Rochester Taxicab Co.**, 163 N. Y. Sup. 904; **Zappas v. Roumeliote (Iowa)**, 137 N. W. 935; **Polites v. Barlin** (Ky. App.), 149 S. W. 828; **Pickett v. Union Terminal Co.**, 33 F. Supp. 244. None of these cases, however, questions the accuracy of the statement made. On the contrary each of them either expressly affirms the same idea or impliedly recognizes its truth."

Judge Otis then considered the actual situation with which he was dealing, namely, one in which the red caps had been served by the Kansas City Terminal Railway Company with a notice identical in language with the notice of October 22, 1938, served on the Dallas red caps. With reference to the effect of the service of such notice, Judge Otis held:

> "None seriously would contend that the red caps did not understand that the defendant intended that after October 21, 1938, tips should be counted in the calculation of minimum wages to be paid as required by the Fair Labor Standards Act. None seriously would contend that the red caps did not understand that the defendant by its announcement asserted rights to and an interest in tips received. It did that when it required that such tips should be reported daily (no employer would require an employee to report gifts in which the employer had no interest). It did that when it specifically made it known that tips were to be included in compensation guaranteed. Especially did it do that when it advised the red caps that they were 'privileged to retain * * * tips.' To grant a **privilege** is to assert the right to grant it. To grant the privilege of retaining tips is to assert the right to demand that they be paid over. The privilege of retaining tips was granted but the grant was not unconditional. The red caps understood what the condition was. They understood and they accepted it. They were to retain the tips **subject 'to their being credited on such guarantee.'** On what guarantee? On the guarantee that the compensation of each red cap will not be less than the minimum wage provided by law.'
>
> "Here was an assertion by the defendant of a claim it had a right to assert, a claim to the tips received by the red caps. Here was an arrangement by which the red cap, when he received a tip, **held it in his custody for the benefit of his employer until he had given his employer credit on his wage, after which it became his separate property.**

"So it appears that there is no **essential** distinction between the hypothetical situation discussed under Assumption No. 2 and that actually presented in this case. In each the defendant asserts its claim to tips and it has the right to do that. In each when the red cap receives a tip, he knows it is the employer's property. In the hypothetical situation the red cap turns in the employer's tip to some agent of the employer to be thereafter used in paying the red cap's wages. In the actual situation, the red cap, pursuant to understanding with his employer, keeps the employer's tip in his own custody, that it may be applied to or credited on his wages. The distinctions constitute no essential difference. Just as under Assumption No. 2, so here, plaintiff is not entitled to recover." (Emphasis the court's.)

In the later case of **James E. Taylor et al. v. Pennsylvania-Reading Seashore Lines**, (April 19, 1941, unreported) Federal District Judge Kirkpatrick (United States District Court for the Eastern District of Pennsylvania) likewise held against the red caps in their suit against the railway company, saying:

"This case is exactly on all fours with the case of Harrison v. Kansas City Railway Terminal Co., 36 F. Supp. 434, recently decided in the Western District of Missouri by Judge Otis. **The reasoning of the opinion seems to me to be irrefutable**, and I place the decision of this case, upon the grounds stated by Judge Otis."

In entering judgment against the red caps, Judge Kirkpatrick made the following, among other conclusions of law:

"5. The money paid to plaintiff by defendant's passengers was compensation paid for services rendered said passengers by plaintiffs as employees of and in the course of their employment with defendant and said money belonged to defendant.

"6. In the alternative, if said money paid to plaintiffs by defendant's passengers was not compensation paid by such passengers for the service rendered by defendant to the passengers, but was a 'tip' in the popular conception of the term as a reward for promptness or courtesy, nevertheless defendant as plaintiffs' employer had the right to direct and control the disposition of this money as money received incidental to the course of the employment and the right to require plaintiffs to pay over to defendant or to require plaintiffs to retain it on account of their wages.

"7. By permitting plaintiffs to retain the money they collected from defendant's passengers and by paying them any difference between the amounts so retained and the amount of the minimum wage provided by the Act, the defendant has paid the plaintiffs the full amount of the minimum wage, and this payment fully satisfies the requirements of the Fair Labor Standards Act.

"8. Plaintiffs are entitled to recover nothing by this action."

In the case of **C. L. Williams v. Jacksonville Terminal Company**, 35 F. Supp. 267, first decided by the United States District Court for the Southern District of Florida, Judge Curtis L. Waller, passing upon the effect of a notice to the Jacksonville red caps identical to the one involved herein, pointed out that the Terminal Station belonged to the defendant company, that not everyone who wished could work on its premises carrying handbags for passengers but that the right to so work under conditions prescribed by the company could be granted or denied as the company saw fit. He said:

"It must not be overlooked that the Terminal Company had the legal right, if it had chosen, to have fixed and collected a fee for the service so rendered,

and to have received the same, but as an incentive to better service, it allowed the red cap to keep all he collected. If he collected more than the legal minimum wage, it was his good fortune—a reward for his hustling—but if he failed to collect the minimum provided by the Act the defendant paid him the difference between the amount collected and the statutory minimum. The red cap stood to win. He could not lose. The company stood only to lose. It could never win. The red cap could often receive for his services more than the minimum wage but never less. Since, therefore, the red cap was compensated by the transfer to him of a legal right of the company to charge and collect fees for these services, the legal effect or result is the same, as far as the red cap is concerned, as if the company had collected these fees and paid the red cap directly instead of indirectly."

The action of the District Court in the Jacksonville Terminal case in denying any recovery to the red caps was affirmed by the United States Circuit Court of Appeals for the Fifth Circuit, reported in 118 F. (2d) 324. With reference to the point under discussion here the Circuit Court said:

"Because what was received from passengers was not gifts but pay for services valued by the passenger, it required no consent on the part of the red cap to make the earnings belong to the employer, who was now bound to pay for the time and efforts of the red cap during work hours. The red cap's reward was to be wages. The employer became entitled to his services and what was received for them. The notice given the red cap was sufficient to make his receipts the money of the employer.

* * * * *

"The Act undoubtedly contemplates that the employee shall be paid his wages by the employer out of employer's funds. But it does not prohibit the employee being given the duty of collecting the em-

ployer's money, and the privilege of paying himself out of it, subject to accounting, provided the employer stands ready to promptly pay any balance due the employee. * * * We do not think the Act condemns ipso facto all payment of wages by accounting, or requires us to say that although the employee got all he ought to have had of his employer's money, the employer must pay again because the employee was allowed to keep what was in his possession instead of paying it to the employer and receiving it back again.

* * * * *

"When it is clearly apprehended that red cap tips are not personal gifts but compensation for service which since October 24, 1938, is rendered by the red caps for the Terminal Company for a wage which the Terminal Company is absolutely bound to pay, it becomes plain that the tip money is the money of the Terminal Company, irrespective of the consent of the red caps; and when they are paid their wages in part or in whole out of it, they are not paid with their own but with their employer's money."

The same principle was recognized and upheld in the case of **William C. Ryan v. The Denver Union Terminal Company**, decided July 17, 1941, by the U. S. District Court for the District of Colorado (unreported). Judge J. Foster Symes of that court held that red cap service was furnished passengers by the terminal company who hired the red caps, fired them and had full control over the whole service; that tips of passengers were in payment for the service thus rendered, and that the red caps, while authorized to collect the tips for the terminal company, had to account to their employer for them, and that upon such accounting the red caps were paid their wages in full and could not prevail in the suit against the terminal company. The same result was reached by the United States District Court for the Eastern District of Missouri in the case of

George M. Harrison v. Terminal Railroad Association of St. Louis, decided March 14, 1941 (unreported).

The only part of Petitioner's brief which appears to challenge the foregoing position is contained in his Point 1 which reads: "The tips received by the red caps in the absence of a contract between them and Respondent providing that the tips would be the property of Respondent were the property of the red caps." This proposition does not directly attack the right of an employer to assert and exercise control and ownership of tips received for services performed by the employer through its employees, but it does appear to proceed upon the theory that the action of the employer in thus undertaking to control tips must be agreed to by its employees in order to be effective. The view thus taken is contrary to all of the authorities cited hereinabove.

The principal cases cited by petitioner in this court, the circuit court and the trial court in support of the abstract proposition that in the absence of an agreement tips belong to employees are **Zappas v. Roumeliote,** 155 Iowa 709, 137 N. W. 935 and **Polites v. Barlin,** 149 Ky. 376, 149 S. W. 828.

In **Zappas v. Roumeliote, supra,** the minor plaintiff had worked as a bootblack under a salary contract and the wages agreed upon were paid him. During his two-year employment he turned over to his employer daily all tips. He brought action to recover back such tips and recovered. The court held:

> "We think the court was right in instructing that the plaintiff would be entitled to **any gifts** in the way of tips, **over and above the regular charge for the**

> **service performed**, given to him by patrons of the defendant's place. * * * The plaintiff **did prove** that the tips were given to him as a gratuity, and were not intended for the defendant."

It will be noted that in the **Zappas case** the employer had a regular charge for the services which he performed through the employee, which regular charge the employer had already received; and that the employee **proved** (1) that the tips were **over and above** the regular charge, and (2) that such tips were given to him as a **gratuity**, and were **not intended** for the employer. In the instant suit, the tips paid for the carrying of hand baggage constitute the sole compensation for the service performed by Respondent through its employees. Such tips were patently received in payment for such service, and were not gratuities given in addition to a regular payment for the service rendered.

In the case of **Polites v. Barlin, supra**, Barlin, the employer, operated a shoe-shining parlor and the employee, Polites, fifteen years of age, was employed to shine shoes and clean hats. He worked five years and ten months and sued to recover $575.00, the amount alleged to have been received by him in tips during this time and paid by him over to his employer, by mistake under the belief that they belonged to the employer. The trial court sustained a demurrer to his claim for the tips paid. The Court of Appeals said:

> "In the original amended petition, it was alleged in substance that it was the habit of the people who came into appellee's place of business * * * to give the particular employee who did the work a donation of money, commonly called a 'tip,' which was a personal

gift to the employee, **in addition to the price charged by appellee for the work done.**"

* * * * *

"It clearly appears, from the amended petition * * * that the money which appellant received as tips was a personal gift to him, and he, and not appellee, was entitled to receive it; that appellant through a mistake and through a misapprehension as to his right, turned the money over to appellee. If this be true, he is entitled to recover; for it is well settled in this state, that where money has been paid through a clear and palpable mistake of law or fact, essentially affecting the rights of the parties, which in law, honor, or good conscience was not due or payable, and which ought not to be retained by the party to whom it was paid, it may be recovered."

The court held that under the allegations, if supported by proof, plaintiff was entitled to have his case submitted to a jury, and reversed the trial court's action on the demurrer.

Thus in the **Polites case**, which turned on a demurrer, the employee pleaded that "the tips were a personal gift to him" and that they were **"in addition to the price charged** by (the employer) for the work done." On the other hand, in the instant suit, the Petitioner did not undertake to prove that the tips were personal gifts, or that they were in addition to a regular charge collected for the service. The distinction was pointed out by the United States Circuit Court of Appeals, Fifth Circuit, in the case of **Williams v. Jacksonville Terminal Company, supra:**

"It would seem that a tip may range from a pure gift out of benevolence or friendship, to a compensation for a service measured by its supposed value but not fixed by an agreement. Most often the term is applied to what is paid a servant in addition to the

regular compensation for his service, to secure better service or in recognition of it."

It is a far cry from a case wherein a tip is given an employee, not in payment for a service rendered by his employer through him, but as a gratuity over and above a fixed charge received by the employer, to a case wherein tips constitute the sole payment for services rendered by an employer who has established as a condition of the employment a requirement that the employee account to him for such tips. The cases cited and relied upon by petitioner are not contrary in any way to our position and are not out of harmony with the cases cited by us.*

In the instant suit, the red caps employed by Respondent retained tips as their own prior to October 22, 1938, because Respondent permitted them to do so. On October 22, 1938, Respondent withdrew its prior consent and prescribed that as a condition of future employment tips would be controlled and owned by it. Petitioner contends that the red caps had to consent to such change before it could be effective. To say that an employer who has permitted his employees in the past to retain tips as their own must con-

* For other cases, not needed to support the proposition advanced by us herein, but holding that tips are wages, see Sloat v. Rochester Taxicab Company, 163 N. Y. S. 904, affirmed 221 N. Y. 491; Bryant v. Pullman Company, 177 N. Y. S. 488; Gross' case (Maine), 166 A. 55. In the Sloat case the court said:

"If the employee had turned the tips over to the employer, as probably would have been his duty in the absence of an understanding to the contrary, the wages of the employee would have been $17.10 a week. If the employee receives from the employer $12.00 and retains the $5.10 in tips, he is getting through or from the employer $17.10 a week; and if the employer paid the employee $17.10 a week and the tips were turned over to the employer, the result to each would be the same. * * * The whole theory of tipping as at present understood in the usual practice, is a payment made in order to get reasonable service, and is an exaction made or permitted by the employer so that his patrons shall help him pay the wages which is fairly due from him to his employees."

tinue to permit them to so retain tips is to say that the employer by once granting such permission has thereafter permanently deprived himself of the legal right to control and dispose of the compensation or income derived from the conduct of his business. The obvious unsoundness of such contention requires no comment.

In and through the notice of October 22, 1938, Respondent exercised its right of control and ownership over tips by prescribing for their disposition. Whether or not the employees approved of such disposition, it was none the less effective. By its notice, Respondent authorized the red caps to collect tips for and on its behalf. Thereafter the tips so collected were Respondent's money constructively in its possession but in the actual possession of its agents, the red caps. Rather than go through the unnecessary mechanics of manual delivery of the company funds to the company and then manual delivery of them back to the red caps, making a round trip, the same legal effect was accomplished by permitting the red caps to retain such company funds as a payment on wages. Since such payment (plus additional checks) made to the red caps herein was admittedly equal to or greater than the minimum wage, no further recovery can be had against Respondent.

POINT II

When an offer of employment is made upon clearly stated terms, and an employee, knowing such terms, goes to work or continues to work thereafter, his action in so working is an acceptance of such proffered terms and he is bound thereby.

Authorities in Support of Point II

L. C. Balfour Co. v. Brown, 110 S. W. (2d) 104;
Erie Railroad Co. v. Tompkins, 304 U. S. 64;
Ex Parte Farb, 174 Pac. 320;
Fidelity Union Trust Co. v. Field, 311 U. S. 169;
Gloyd v. Hotel LaSalle Co., 221 Ill. App. 104;
Shuppan v. Peoria Terminal Railway Co., 30 F. (2d) 569;
6 Companies of Calif. v. Joint Highway District, 311 U. S. 180;
Stoner v. New York Life Ins. Co., 311 U. S. 464;
West v. American T. & T. Co., 311 U. S. 223.

Argument in Support of Point II

While it is unnecessary that there be an acceptance by employees of directions from an employer under the terms of which the latter exercises its right of control and ownership over the income, in the form of tips, received for service performed by such employer, nevertheless if there be such acceptance, there can be no question as to the binding effect thereof. Even District Judge Atwell, the only judge, of all those before whom these red cap claims have been presented, who permitted a recovery, did not disagree with this proposition. He held that Respondent's

notice of October 22, 1938, prescribed new terms of employment, but that the terms were subject to acceptance by the red cap employees, and that they were not accepted. He held that Petitioner's letter of October 24, 1938, (set forth on pages 3-4 hereof) was a rejection of the employer's new terms of employment, and that therefore there was no meeting of the minds and no contract. Judge Atwell announced from the bench after the close of the evidence (Tr. of R., pp. 276-7):

> "On October 22, 1938, the defendant through its general manager at Dallas, notified each of the red caps who are operating through the plaintiff here, that the defendant claimed that that act was applicable to them, and in order to comply with the provisions they should thereafter consider that the tips which they received from the public, and which had theretofore remunerated those red caps for work which they were doing for the defendant, would be used in part to pay them the minimum wage of twenty-five cents per hour. That if such tips did not amount to that much, that then and in that event, the defendant would give them a sufficient amount to equal that legal requirement.
>
> "That letter was an offer of a contract of employment, and when it was received by the employee, that employee had a reasonable time in which to answer it and let it be known whether or not he would agree to that new arrangement. Then, two days after the receipt of the letter, they notified the defendant that they would not agree to it. That they recognized the law as binding upon the defendant and upon themselves, and that they expected to follow its provisions, or words to that effect.
>
> "There was, therefore, no meeting of the minds of the defendant and its employees."

Petitioner adopts this theory under his Point II, wherein he asserts that after service of the employer's notice of

October 22, 1938, "The representative filed a protest against the action of Respondent. This left the action of Respondent unagreed to. There was, as Judge Atwell found, no meeting of the minds."

The unsoundness of this position taken by Judge Atwell and adopted by Petitioner is the subject matter of this proposition. It involves the answer to two questions: (1) Does Petitioner's letter of October 24, 1938, amount to a rejection of employment under the notice of October 22, 1938; and (2) even if the letter of October 24, 1938, be construed as a rejection of an offer, can it be held to prevail in the light of the **action** of the red caps in thereafter continuing in Respondent's employ, handling baggage, reporting tips, and otherwise complying with the terms of the notice of October 22, 1938?

The first clause of Petitioner's Point II reads (p. 24 of Petitioner's brief): "The notices served by Respondent on the red caps on October 22, 1938, did not become a part of the employment contract of the red caps because they protested against the proposed arrangement." This would seem to imply a recognition by Petitioner that if the red caps had not protested, such notice would have become part of the employment contract (except for Petitioner's contention with reference to alleged violation of the Railway Labor Act and the Interstate Commerce Act, which will be dealt with in a subsequent proposition). In other words, it is not claimed that there is anything in the common law forbidding the making of a contract of employment under the terms of which it is agreed that tips shall

be the property of the employer, to be disposed of as he sees fit.* Was such a contract made herein?

Since the letter written by Petitioner, A. J. Pickett, on October 24, 1938, is the instrument upon which the decison of the trial court herein was based, it is important that its contents be examined to see just what it says (particularly so since Petitioner's brief contains no analysis of the terms of such letter, Petitioner being content merely to designate it as a "protest").

The first paragraph of the letter reads:

> "I have a copy of a circular issued by your company dated at Dallas, Texas, on October 22, 1938, and which was handed to each employee to whom it was addressed: i.e., red caps, the general tenor of which is to require the individual employee to report to the carrier the amount that he receives in tips from the public and which information the carrier intends to

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* See **Gloyd v. Hotel LaSalle Co.**, 221 Ill. App. 104, in which an employee, more than a year after his discharge, questioned the validity of his contract of employment, by the terms of which all tips received by him as a checker were turned over to the hotel company as its own. He sued for a return of his tips. The court held:

> "The contract of employment of plaintiff as a checker and the conditions thereof, including the agreement that the tips received by plaintiff should be the property of defendant, was not a contract ultra vires of the charter powers of defendant, because such contract related to the business of the hotel and the duties of plaintiff in such employment. Neither was such contract contrary to public policy. The terms of the contract were ratified three times daily, except on Sundays, and then once or twice, by plaintiff paying over to defendant the money received by him as gratuities."

Also see **Ex Parte Farb.** (Calif.) 174 Pac. 320, in which the question at issue was the constitutionality of a California law making it a penal offense for an employer to contract with his servant that the tips received by the servant belonged to the employer, and the court held that the statute was unconstitutional on the ground that it violated the constitutional right of the parties to freedom of contract. It was therein said by the court:

> "Even if we concede that the gratuity is essentially a personal earning of the employee, nevertheless it must be true that one may enter into a contract involving the expenditures of one's earnings.
>
> "The statute under review is void because it is in conflict with the due process provision of the Constitution of the United States." (U. S. Supreme Court authorities cited.)

employ in compiling its records to indicate that it has complied with Section 6 of the Fair Labor Standards Act."

There is nothing in the foregoing quoted paragraph which suggests a rejection of the terms of employment prescribed in Respondent's notice of October 22nd; it is simply the writer's summary of the contents of the notice. The letter continues:

"In other words, the carrier contemplates crediting tips and other monies paid its employees by persons other than itself to relieve itself of the obligation imposed by the following quoted section of the law:

" 'Fair Labor Standards Act:

" 'Section 6-(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:—

" '(1) during the first year from the effective date of this section, not less than 25 cents an hour.' "

This again is simply a further attempt of the writer to summarize the notice from his own viewpoint, accompanied by a quotation from the Act. It says nothing about any employee rejecting the company's terms of employment.

The next two paragraphs of the letter read:

"The above section of the law which is quoted in part for the purpose of this notice, clearly sets forth that every employer who engages in commerce shall pay to each of his employees during the first year after the effective date of the law 25 cents per hour.

"An examination of the law in its entirety does not authorize the carrier to depend upon others to discharge its obligation with respect to the law, in payment of wages imposed thereby."

These two paragraphs contain merely a statement of the writer's interpretation or construction of the Fair Labor Standards Act. They do not contain a rejection of the employment offered. The letter then concludes:

> "This letter is formal notice to the carrier, made for and on behalf of each employee concerned as a protest against the method proposed by the carrier to meet its obligation under said law, and since it appears that the carrier has acted in the premise without authority of law or upon order of the administrator, we are accordingly filing this notice of protest, for the reasons set forth herein." (End of letter.)

Here appears the word "protest" which is against the **method** proposed by Respondent to comply with the law, accompanied by an expression of opinion on the writer's part that the law would not be complied with by the employer putting the terms of the notice into effect. The quoted paragraph contains nothing even implying that the employees reject the notice or reject employment, and contains **nothing in conflict with the subsequent action of the employees** in working for a year and a half under and in accordance with the employer's notice. It is simply an expression of the writer's views that the terms set out in the notice do not comply with all requirements of the Fair Labor Standards Act, and a reservation of the right to test the **validity** of the notice.

Of course the red caps are entitled to the full protection of the Act, and if the terms of the notice, as contended by Petitioner in his letter of October 24th, were not in compliance with the Act, it did not deprive the red caps of any rights they may have had under the Act; but the letter of October 24th did nothing more than express an opinion that the notice of October 22nd was not in compli-

ance with the Act, and reserved to the red caps their right to test that legal question. Certainly the letter does not purport to reject **any lawful part** of such notice.

On the other hand, even if Mr. Pickett's letter of October 24th could be construed as undertaking not only to question the lawfulness under the Act of the conditions imposed by the notice and to preserve the rights of the red caps under the Act but also as undertaking to reject the employment offered by the notice and to refuse to work thereunder, the conduct of the red caps in actually "thereafter engaging in the handling of baggage" operated as an acceptance of the terms of employment set forth in the notice, the only terms of employment offered by the company. This is true regardless of any construction that might be placed on the so-called "protest."

The contracts of employment involved herein were made and performed in Texas. The Texas law controlling upon this point,* is clearly set out in **L. C. Balfour Co. v. Brown,** 110 S. W. (2d) 104. In that case an employee, by cross action, sought to recover commissions as compensation for his services, basing his claim on his original contract of employment. The employer defended on the ground that the original contract had been changed with respect to commissions to be paid for the employee's services, by the employer's notice of a change therein given to the employee, notwithstanding a protest of the change by the employee. The trial court held that the employee could recover commissions and bonuses allowed under the terms

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* **Erie Railroad Co. v. Tompkins,** 304 U. S. 64; **West v. American T. & T. Co.,** 311 U. S. 223; **Fidelity Union Trust Co. v. Field,** 311 U. S. 169; **6 Companies of Calif. v. Joint Highway District,** 311 U. S. 180; **Stoner v. New York Life Ins. Co.,** 311 U. S. 464.

of the original contract, since he did not consent to any modification thereof. This reasoning, which is similar to that of the Petitioner in the instant case, was rejected on appeal by the appellate court, which held:

> "The original contract could be terminated by either party in the manner therein set out; and while appellant did not, in so many words, declare its intention to terminate the contract and give the thirty days' written notice to appellee, yet its letter of August 22, 1934, had that effect; at least it was a declaration amounting to a breach of the terms of the contract in the matter of compensation to appellee. * * *
>
> "When appellant made this change in appellee's compensation at variance with the contract, he was called upon to elect whether he would accept the modified contract or rely upon the old and sue for its breach. **He could not continue his services under the new or modified contract and later rely upon the terms of the old**; his election must have been made within a reasonable time after the condition arose. Appellee continued in appellant's services with full knowledge of the new schedule of commissions and bonuses provided for in the letter of August 22, 1934; but of course **this continued service was not without protest; however, an earnest protest was not sufficient, he was called upon to act; this he did by continuing in the service.**"

In the present case after the company served the notice of October 22, 1938, the red caps were called upon to elect whether they would accept the change or treat the relationship as ended. In the language of the foregoing Texas decision, "An earnest protest was not sufficient," they were "called upon to act, and this they did by continuing in service." Petitioner would have this action of the red caps ignored and the situation treated just as though no

new terms of employment were laid down on October 22, 1938. But the red caps "could not continue their services under the new or modified contract and later rely upon the terms of the old." The action of the red caps was controlling; they worked thereafter under the only terms upon which continued employment was offered them.

This sound and equitable rule of law was also recognized by the United States Circuit Court, Tenth Circuit, in the case of **Shuppan v. Peoria Terminal Railway Co.**, 30 F. (2d) 569. In that case the Peoria Terminal Company found it necessary, because of its financial condition, to enter into a new arrangement with its employees relative to their wages. The employees were told that they could take their choice between one of two courses: either accept a certain wage, or, in the alternative, take and divide among them the receipts of the company, after deduction of the other costs of operation. Within a few days after these conditions were announced, the employees held a meeting and decided **they would not accept either proposal,** and they so advised the management of the Peoria Terminal Company. Shortly thereafter the general manager of the Peoria Terminal Company **posted a bulletin** outlining the manner in which wages would be handled. The Employees' Committee then wrote the manager again protesting and **stating definitely that they would not accept the terms of employment** as set forth in the Peoria Terminal Company's bulletin. Nevertheless, the employees continued to work thereafter (as did the red caps in our case), and the company then began to pay the employees as announced in the bulletin. After letting a year or so go by (as the red caps did in this case), the employees brought suit for the dif-

ference between the wages received by them and the wages they claimed they were entitled to under their previous arrangement. The court held that, despite their written notification that they would not accept the terms of employment offered, the employees by **remaining** in the employ of the company, accepted the company's proposal, stating at page 570:

> "Offered the alternative of accepting a wage cut or leaving the service, the men reported apparently to the effect that the wage cut was not acceptable. Still no one left the service. By remaining in the employ of the company they manifested more positively that the proposal that they leave the service was not acceptable.*
>
> "Only the company could fix the wages of those who were willing to work for it. Only the employees themselves could say for whom they would work. If either proposed terms of employment unacceptable to the other, nothing prevented the dissatisfied party from terminating the relationship. The company, having made it clear what wages it would pay its employees, those who took employment with it thereafter or **those who continued in its employment,** though mistaken as to the power of the company to fix wages, must be deemed thereby to have accepted the only terms upon which such continued employment was offered."

Petitioner's interpretation of the facts in the instant case (construing the letter of October 24, 1938, as a rejection of an offer), fits exactly the facts of the **Shuppan case.** Respondent on October 22, 1938, had advised each red cap in clear language that he would thereafter be permitted to work on its premises, engaging in the hand-

* It might be stated here that in the **Shuppan case** nothing was actually said in the employer's bulletin about leaving the service if the terms of the offer of employment were not acceptable.

ling of hand baggage and collecting tips for such service, on the **condition that such tips be accounted for and be applied upon a minimum wage** which the employer guaranteed to pay him. While the employees under date of October 24, may have entertained and expressed the view that the Respondent was not complying with the Act, and might even, for argument's sake, be said to have written a letter on October 24 refusing to work under the conditions laid down, nevertheless on October 24 and October 25, and ever since **they have worked.** Therefore, since Respondent made it clear to whom the ownership and control of tips would belong, under the principle of the **Shuppan case,** "those who took employment with it thereafter, or those who continued in its employment * * * must be deemed thereby to have accepted the **only terms upon which such continued employment was offered."**

Petitioner did not cite in the Circuit Court and has not cited in this court any authority contrary to the **Balfour** and **Shuppan cases.** Respondent submits that there is no contrary authority.

Petitioner undertakes to get away from the holdings in the **Shuppan** and **L. C. Balfour Company cases** by asserting that in the instant suit Respondent "conceded" or "recognized" through a letter written on December 6, 1939, and through Rule 16 of the Red Cap Agreement of January 1, 1940, that the question of the status of tips "was open for further determination by the Courts." It is not clear just what Petitioner means by such expression; but whatever is meant, an examination of the two instruments will demonstrate that they did not destroy or in any way affect the agreement consummated by the action of the

red caps, on and after October 24, 1938, in working under and in accordance with the terms of Respondent's notice of October 22, 1938.

On December 6, 1939, Murrell L. Buckner, Vice-President of Respondent, wrote a letter to Petitioner A. J. Pickett reading as follows:

"Dear Mr. Pickett:

"Referring to our conversation and letter which you showed me from Mr. Harrison in reference to the Kansas City Terminal agreement with the red caps.

"I have carefully read this agreement and I see nothing in it that is in any way out of line, except that Rule 6 would not apply to this property and Rule 17 is not clear.

"As I told you and as you know, this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 per day, is in the court and as soon as same is decided we will be glad to negotiate an agreement with the Clerks Union of which you are the General Chairman for this Company.

"Very truly yours,

(Signed) MURRELL L. BUCKNER."

Subsequently, on January 1, 1940, a collective bargaining agreement was entered into, which, among other things, provided that no red cap should be dismissed without just cause and that any red cap should have the right of appeal to the highest officers of the company. The contract then contained this section (Tr. of R., p. 134):

"If the final decision decrees that the charges against the red cap were not sustained, the record shall be cleared of the charge; if suspended or dismissed, the red cap shall be reinstated with seniority and rights unimpaired. The employee shall be reimbursed for any money losses suffered; provided

that it is subsequently determined that under the provisions of the 'Fair Labor Standards Act,' the carrier is required to pay a wage to the red caps over and above any amounts that may be received by them as tips. (Note): This rule shall not be construed as requiring the carrier to reimburse red caps for loss of tips, either now or in the future."

Petitioner maintains that both of these documents show that the company admitted that the question of whether the plan was in operation was an "open one." In the letter of December 6th, Respondent did no more than acknowledge the existence of a lawsuit, and by the collective bargaining agreement, the parties merely agreed that in the event of an unjustified discharge of an employee, the wage loss would be settled in accordance with the provisions of the Fair Labor Standards Act as construed by the courts. The only effect of the letter and the collective bargaining agreement was to point out that litigation was pending, and to recognize the uncontroverted fact that the litigation would be decided in accordance with the Act.

So far as Mr. Buckner's letter of December 6th is concerned, Respondent has no hesitancy in saying now exactly what Mr. Buckner said then, namely, that "this case as to whether or not the railroads will be allowed credit for tips received up to $2.40 a day is in the courts" and so far as the agreement of January 1, 1940, is concerned, Respondent has no hesitancy in saying now, accepting the interpretation of Petitioner as set forth on page 34 of his brief, that in such agreement "it was recognized that the question as to whether Respondent was required to pay a wage in addition to tips was to be determined by the courts." Respondent does not consider that it is making any significant concession when it admits that this Court has full

authority and jurisdiction to pass upon the effect of Respondent's notice of October 22, 1938, and to determine whether or not Respondent was within its rights in exercising control over the income in the form of tips received for the performance by it of a service through its employees. This is the **only** distinction that Petitioner undertakes to make between the **L. G. Balfour Company** and **Shuppan cases** and the instant suit, namely that in the latter it was recognized that the courts were passing upon the legality of the accounting and guarantee arrangement, The courts **are** passing upon the matter—seven courts to date; and the courts also passed upon the matter in the **L. G. Balfour Company** and **Shuppan cases**—and adversely to the position of Petitioner.

That the matter is subject to litigation, however, does not take this case out of the rule as laid down in the **Shuppan case**, nor the rule of the **L. G. Balfour Co. case**, which is the law in Texas. It does not operate to destroy retroactively the effectiveness of the notice of October 22, 1938, or to change the effect of the action of the red caps on and after October 24, 1938, in working under the terms of the notice, taking advantage of the opportunity thereby afforded them to make a good living on the privately owned premises of Respondent, accounting for the tips that they were thereby enabled to obtain, and accepting Respondent's checks covering any deficit. And it does not affect the soundness of the basic proposition asserted herein, namely, that the notice of October 22, 1938, and the con-

duct of the red caps thereafter, imposed upon them the terms of the notice providing that tips were to be credited on the guaranteed minimum wage, and such terms became and continued to be a lawful and indivisible part of the contract of employment.

POINT III

Nothing in the Railway Labor Act or Interstate Commerce Act operates to nullify the effectiveness of Respondent's notice of October 22, 1938.

Authorities in Support of Point III

Buffington v. Owosso Mfg. Co., 105 F. (2d) 692;
Great Northern Railway Co. v. Merchants Elevator Co., 259 U. S. 285;
Harrison v. Kansas City Terminal Ry. Co., 36 F. Supp. 434;
Harrison v. Pullman Company, 68 F. (2d) 826;
Loomis v. Lehigh Valley Railroad Co., 240 U. S. 43;
Midland Valley R. Co. v. Barkley, 276 U. S. 482;
Minnesota Rate Cases, 230 U. S. 352;
Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U. S. 247;
Rochester Tel. Corp. v. United States, 307 U. S. 125;
St. Louis, B. & M. Ry. Co. v. Brownsville Navigation District, 304 U. S. 295;
Texas & Pacific R. Co. v. American Tie and Timber Co., 234 U. S. 138;
Union Terminal Co. v. Pickett, 118 F. (2d) 328;
Virginian Railway Company v. System Federation No. 40, 300 U. S. 515.

Argument in Support of Point III

A. Railway Labor Act

Under his Point II Petitioner advances the argument that the notice of October 22, 1938, did not accomplish its purpose of exercising control and ownership of tips and did not become a part of the employment contract of the

red caps due to the fact that on October 11, 1938, Petitioner wrote a letter (Tr. of R. 142) to Respondent stating that the red caps had authorized his organization to represent them in the making of a working agreement and suggesting a conference for the purpose of exhibiting such authority and negotiating an agreement covering working conditions.

Petitioner asserts that after receipt of this letter of October 11th, Respondent, under the first and second paragraphs of Section 2 of the Railway Labor Act, was required "to exert every reasonable effort" to negotiate an agreement covering rates of pay, rules and working conditions. Petitioner then assumes, without any proof, that Respondent did fail to exert reasonable effort and concludes that Respondent's action of October 22, 1938 (which Petitioner terms "unilateral") was therefore void.

The Fair Labor Standards Act became effective on October 24, 1938. Respondent was required to comply with its terms or subject itself to the very stringent criminal penalties of the Act. But Petitioner argues that Respondent could not comply with the Fair Labor Standards Act because a compliance would mean a change in rate of pay or manner of payment, which, according to Petitioner, would be a violation of the Railway Labor Act. So, if this proposition of Petitioner be correct, Respondent could not have complied with the Fair Labor Standards Act even by a notice to the red caps (presumably unless preceded by some action in response to Petitioner's letter of October 11) that beginning October 24, 1938, the red caps would be paid 25¢ an hour, because such action would have been in violation of the Railway Labor Act and, therefore, void.

Respondent submits that paragraphs first and second of Section 2 of the Railway Labor Act do not contemplate that the carrier take no action with respect to its business pending the negotiation of a collective agreement, nor do they contemplate that any action taken in the interim shall be void. If a carrier refuses to negotiate (although no refusal was shown in this case) remedies are provided in the Railway Labor Act. Those remedies, however, do not include the denial to a carrier of the right to conduct its business in the meantime in accordance with all laws. On the contrary it must continue to conduct its business and it certainly must act when its failure to do so would be a violation of the Fair Labor Standards Act.

In support of the novel proposition that Respondent's compliance with the Fair Labor Standards Act was void because it was in violation of the Railway Labor Act, Petitioner cites the case of **Virginian Railway Company v. System Federation No. 40**, 300 U. S. 515, 81 L. Ed. 789, 57 S. Ct. 592. The latter case is the sole authority cited by Petitioner. We submit that the real holding in the **Virginian Railway Company case** is directly against Petitioner. On pages 548 and 549 the Supreme Court stated:

> "Petitioner's insistence that the statute does not warrant so much of the decree as forbids it to enter into contracts of employment with its individual employees is based upon a misconstruction of the decree. Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. * * * We think, as the Government concedes in its brief, that the injunction against Petitioner's entering into any contract concerning rules, rates of pay and working conditions,

except with respondent, **is designed only to prevent collective bargaining with any one purporting to represent employees, other than Respondent,** who has been ascertained to be their true representative. When read in its context it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than Respondent, **but not as precluding such individual contracts as Petitioner may elect to make directly with individual employees."**

In a footnote the Supreme Court quotes from the Government's (amicus curiae) brief in part as follows:

> "Neither the statute nor the decree prevents the carrier from refusing to make a collective contract and hiring individuals on whatever terms the carrier may by unilateral action determine."

Apparently neither the Supreme Court nor the Government considered that the term "unilateral action," decried by Petitioner in his brief, carries any particularly abhorrent implication (although we might say here that the notice of October 22, 1938, was unilateral **only until the red caps went to work in keeping with its terms** on and after October 24, 1938).

Collective agreements require time to negotiate and consummate, as is evidenced by the fact that the present existing agreement was not completed and executed until January 1, 1940, and obviously Respondent could not have ignored the Fair Labor Standards Act until that date without subjecting itself to the very severe penalties of the Act.

The argument advanced by Petitioner is grounded upon a further fallacy in its assumption that Respondent refused or failed to negotiate with Mr. Pickett or was guilty

of some unreasonable and unlawful delay in connection therewith. Petitioner states that on October 11, 1938, Mr. Pickett wrote Respondent suggesting a conference. Petitioner states that it then became the duty of Respondent "to exert every reasonable effort" to make an agreement. But Petitioner wholly fails to point out wherein the record discloses any failure on the part of Respondent to reply to the letter of October 11, 1938, or to exert such "reasonable effort" as Petitioner may have in mind (but which is left vague and undefined in Petitioner's argument).

The date of the next letter appearing in the record is December 26, 1938, a letter written by Mr. Pickett to Mr. Buckner, general manager of The Union Terminal Company. However, the opening sentence of this letter reads:

> "Enclosed you will find a draft of the proposed agreement as **requested** covering the red caps." (Tr. of R. 143.)

It is obvious from this sentence that one or more communications, oral, written, or both, had theretofore moved from Respondent to Pickett, including a request for the draft of the proposed agreement. The record is silent as to the number or dates of such communications.

Petitioner offered no testimony to the effect that Respondent delayed any suggested conference or failed to reply to any letter, although Petitioner now takes the position that such fact, if developed, would be material. Although Petitioner placed upon the witness stand several officials of the red caps' organization, including the secretary, who presumably were familiar with the situation, none of them was asked by counsel for Petitioner whether or not a reply to the letter of October 11, 1938, was re-

ceived by the organization or whether or not there was any delay in conferences. The nearest approach that Petitioner made to the subject under discussion came in response to the first question propounded by Petitioner's counsel to L. H. Akers, assistant general chairman of the organization (Tr. of R. 199):

> "Q. Were you familiar with the meeting that took place **at various times** with Mr. Buckner and the officials of the defendant company **from** October 11, 1938, up to the time of the signing of this agreement dated January 1, 1940?
>
> "A. Well, yes, sir, more or less; I was more or less familiar with it."

The date of the first meeting or conference is not developed in the record, except as the foregoing question and answer may indicate that it was on or after October 11, 1938. Mr. Pickett, who wrote the letter of October 11th, did not testify. It obviously did not occur to either party in the trial court that the matter was of any importance (nor does Respondent consider it of any importance now). If Petitioner should suggest that Respondent made no affirmative offer of proof of compliance with the Railway Labor Act, we would reply that neither in the complaint, nor in any other instrument, argument or even suggestion filed with or made to the trial court was Respondent charged with a violation of the Railway Labor Act. And had it been, the burden would certainly have been upon Petitioner to sustain any such charge. In this connection, we wish to point out that the alleged violation of the Railway Labor Act was raised by Petitioner for the first time in the Circuit Court, and therefore could not be considered now even if it were material, which it is not.

In the case of **Harrison v. Pullman Company**, 68 F. (2d) 826, a Pullman porter brought suit against the Pullman Company for alleged wrongful discharge. In the trial court, recovery appears to have been sought principally upon the ground of breach of contract in failing to give to the employee a hearing as to the cause for his dismissal. In the Circuit Court, the employee asserted for the first time that in dismissing him the Pullman Company had violated the Railway Labor Act, thereby entitling him to recover. The substance of the court's holding is concisely stated in syllabus 2 on page 826:

> "Where no right to relief in trial court was predicated on violation of Railway Labor Act, but Pullman porter sued for wrongful discharge alone, such act could not be relied on in appellate court. (Railway Labor Act, paragraph 2, subsection 3, 45 U. S. C. A., section 152, subsection 3.)"

In the language of the court (Eighth Circuit), page 827:

> "Appellant, in this court, by additional assignment of error, denied because not justified by the record, seeks to invoke the provisions of the Railway Labor Act of May 20, 1936 (45 U. S. C., Sec. 152, subsec. 3), claiming that the evidence discloses coercion of employees in violation of said act. No reference to this act is contained in the pleadings, nor was this contention brought to the attention of the trial court. The contest below concerned the application of the contract sued on and whether appellant had so far brought himself within its terms as to justify this action for its breach.
>
> "The motion for a directed verdict was properly sustained, and the judgment below affirmed."

This decision was cited and followed in the case of **Buffington v. Owosso Mfg. Co.**, 105 F. (2d) 692. In a reply brief filed in the Circuit Court, the plaintiff called atten-

tion to certain Arkansas statutes, taking the position that they should be considered in connection with the defenses relied upon by the defendant. The court held (page 697):

> "Plaintiff urges that under these statutes the defendant was barred from asserting the defense of assumed risk. In addition to the fact that the statutes relied on were not referred to in the pleadings, nor in any manner called to the attention of the trial court, which would, in our opinion, preclude any consideration of it by this court, * * *". (Citing a number of authorities.)

We invite the court's attention to Petitioner's complaint. (Tr. of R. 26.) The Fair Labor Standards Act is alleged to have become effective on October 24, 1938, and the only complaint against Respondent consists of an alleged failure to comply with such Act from October 24, 1938, to the date of the filing of the complaint, March 6, 1940. No act or omission by Respondent prior to October 24, 1938, is alleged. The Railway Labor Act is not mentioned.

A brief was filed by Petitioner in the trial court in opposition to Respondent's motion for a new trial, and can be found in the Transcript of Record, pages 87 to 104. This brief not only fails to call the trial court's attention to any alleged violation of the Railway Labor Act, but on page 90 of the Transcript of Record (the only place where the Act is mentioned) specifically recites that both parties had undertaken to comply with such Act, the language used by Petitioner being:

> "Both the Fair Labor Standards Act and the Railway Labor Act are intended to promote commerce by avoiding strikes to settle labor disputes, and both parties hereto attempted to carry out such purpose by entering into negotiations for a working agree-

ment to govern the relations between defendant and the red caps."

Thus not only does the record fail to establish any unreasonable delay upon Respondent's part in proceeding with negotiations, but Petitioner appears to have conceded that both parties undertook to negotiate and did negotiate a working agreement under the Railway Labor Act. Petitioner's effort to reverse himself and to raise a new and wholly unsound theory in the Appellate Courts must fail on any one of the several counts pointed out herein.

B. Interstate Commerce Act

Petitioner, still seeking a recovery under the Fair Labor Standards Act, undertakes to inject the Interstate Commerce Act into the picture. Making an argument similar to that in which he undertakes to call to his aid the Railway Labor Act, Petitioner urges that the appropriation of tips by Respondent would be a violation of the Interstate Commerce Act because its effect would be to make a charge to passengers that is not uniform and is not filed with the Interstate Commerce Commission. He then argues that Respondent's compliance with the Fair Labor Standards Act is void because in some particulars it violates the Interstate Commerce Act; and that the red caps are thus left unpaid under the Fair Labor Standards Act, although admittedly they received and kept the money covering their wages. In other words, it is urged that Respondent improperly took from the passengers the money with which wages were paid, and that therefore the red caps, although keeping such money, should be paid another wage out of funds properly obtained by Respondent. Small

wonder that Judge Merrill Otis in the **Kansas City Terminal case, supra,** termed this a "most curious argument."

Questions involving the propriety of charges and related questions arising under the Interstate Commerce Act must be submitted to and ruled upon by the Interstate Commerce Commission before they can be proper subject matter for consideration by a court of law. This court has so held in several cases. In **Loomis v. Lehigh Valley Railroad Co.,** 240 U. S. 43, involving a claim of shippers for sums expended in constructing grain doors in cars furnished by a carrier, the court said:

> "An adequate consideration of the present controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered. In the last analysis the instant cause presents a problem which directly concerns ratemaking and is peculiarly administrative. Atchison, T. & S. F. R. Co. v. United States, 232 U. S. 199, 220. And the preservation of uniformity and prevention of discrimination render essential some appropriate ruling by the Interstate Commerce Commission before it may be submitted to a court. See Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S., pp. 128, 129; Pennsylvania R. Co. v. Clark Coal Co., 238 U. S., pp. 469, 470."

In **Texas & Pacific R. Co. v. American Tie and Timber Co.,** 234 U. S. 138, the general rule was stated thus:

> "* * * for the preservation of the uniformity which it was the purpose of the act to regulate commerce to

secure, the courts may not as an original question exert authority over subjects which primarily come within the jurisdiction of the Commission."

See also **Mitchell Coal & Coke Co. v. Pennsylvania R. Co.**, 230 U. S. 247; **Minnesota Rate Cases**, 230 U. S. 352; **St. Louis, B. & M. Ry Co. v. Brownsville Navigation District**, 304 U. S. 295; **Midland Valley R. Co. v. Barkley**, 276 U. S. 482, and **Rochester Tel. Corp. v. United States**, 307 U. S. 125. See, also, the list of cases to the same effect in footnote to **Great Northern Railway Co. v. Merchants Elevator Co.**, 259 U. S. 285, at 295.

The question of whether or not this is a service covering which a tariff should be published, or whether or not some passengers have been discriminated against as compared to other passengers, are questions for the determination of the Interstate Commerce Commission and can only be raised by complaint filed with that body by some person affected by the so-called charge, such as a passenger who has paid it. As in the case of the Railway Labor Act, the Interstate Commerce Act provides for its own processes and its own remedies. If, by appropriate proceedings before the Interstate Commerce Commission, it be determined that payments for this service performed by Respondent should be reflected in a published tariff, Respondent will be governed accordingly. But any such proceeding or the result thereof, could have no bearing upon the relationship or the reciprocal obligations, past or future, between Respondent and its employees. If a carrier should collect freight charges not uniform or not covered by a published tariff and should pay wages to its employees out of funds thus collected, the shipper involved might com-

plain in a proper proceeding, but the employees could hardly be heard to say that they are entitled to their wages again out of different funds. As the United States Circuit Court herein pointed out with reference to this argument of Petitioner:

> Nor do we think it lies in the red caps' mouths to say that the whole idea of letting the passenger fix the amount of compensation for porter service is repugnant to the Interstate Commerce Act as discriminating in favor of the passenger who pays less and against one who pays more. But if they can urge it, and if this is a transportation service requiring uniformity of charge, and if a court rather than the Interstate Commerce Commission may deal with it, the wrong would not be righted by giving a red cap this money and double wages besides."

This holding of the Circuit Court **is not challenged** by any Specification of Error (See Petitioner's "Specifications of Error," pages 10 and 11 of his brief), nor in Petitioner's motion for a rehearing filed with the Circuit Court. We submit that the Circuit Court was correct, and that there exists no right in the red caps to have a double wage paid out of the funds of Respondent **other** than those received from passengers in payment for red cap services.

POINT IV

The Terms of Employment contained in Respondent's notice of October 22, 1938, were in full compliance with both purpose and language of the Fair Labor Standards Act.

Authorities in Support of Point IV

Alexander Hamilton Hotel Corp. v. Board of Review, 21 A. (2d) 739;

Bryant v. Pullman Company, 177 N. Y. S. 488;

In Re Club Troika, 2 N. L. R. B. 90;

Federal Underwriters Exchange v. Husted, 94 S. W. (2d) 540;

Gross' case, 166 Atl. 55;

Keifer and Keifer v. Reconstruction Finance Corporation, 306 U. S. 381;

Lincoln v. Ricketts, 297 U. S. 373;

Lloyds Casualty Company v. Meredith, 63 S. W. (2d) 1051;

Ozawa v. United States 260 U. S. 178;

Powers' case, 176 N. E. 621;

Sloat v. Rochester Taxicab Company, 163 N. Y. S. 904;

United States v. American Trucking Association, Inc., 310 U. S. 534;

United States v. Stone & Downer Co., 274 U. S. 225;

Webster's International Dictionary, 2nd Edition;

In Re Willard, 2 N. L. R. B. 1094;

Williams v. Jacksonville Terminal Co., 35 F. Supp. 267;

Williams v. Jacksonville Terminal Co., 118 F. (2d) 324.

Argument in Support of Point IV

A. Purpose of the Act

It is axiomatic that in obtaining a reasonable statutory construction the intent of Congress is an all-important factor: **United States of America v. The American Trucking Association, Inc.**, 310 U. S. 534; **Ozawa v. United States**, 260 U. S. 178, and **United States v. Stone & Downer Co.**, 274 U. S. 225, 239. In the **Stone & Downer Co. case**, at page 239, the court also stated that the "greatest light is thrown on that intention in this case by an examination of the existing conditions and the anticipated evils against which * * * Congress sought to protect the country." Of similar import is **United States v. American Trucking Association, supra**, wherein this court stated that in construing a statute, "Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." This court then went on to say:

> "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsman of a statute, particularly in a law drawn to meet many needs of a major occupation. There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this court has looked

beyond the words to the purpose of the Act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one * * * plainly at variance with the policy of the legislation as a whole this court has followed that purpose, rather than the literal words."

The Fair Labor Standards Act has a "finding and declaration of policy" section, and there the purpose of the Act is plainly stated. It is submitted that, so far as wages are concerned, that purpose is to require a minimum quantum of compensation for the employee covered thereby so that he may maintain a minimum standard of living. Section 2 of the Act provides:

"(a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor **conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers** (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several states; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several states, to correct and as rapidly as practicable **to eliminate the conditions** above referred to in such industries without substantially curtailing employment or earning power."

Manifestly, by this Act, Congress sought to eliminate "labor conditions detrimental to the maintenance of the

minimum standard of living necessary for health, efficiency, and general well-being of workers" because the existence of these labor conditions caused their spread via interstate commerce among workers in all states and caused certain burdens and obstructions to commerce.

The means adopted by Congress of eliminating wages below the level necessary for a minimum standard of living was to prescribe a minimum hourly wage of 25 and 30 cents. Obviously, the "minimum standard of living wages" would be assured where, as here, the compensation **received** by an employee for services furnished to Respondent's patrons, and on its behalf, equaled or exceeded 25 or 30 cents per hour. There is nothing in Section 2 which indicates that the policy or purpose of the Act was not only to see that the "minimum standard of living wages" were paid to employees but also to see that those wages were paid in some particular manner. As the result to be accomplished was the **receipt** by the **employee** of 25 cents an hour for each hour of work, it was entirely consistent with the policy of the Act to put into effect the accounting and guarantee plan. Twenty-five cents received as tips in an hour and retained by Respondent's permission was just as useful as 25 cents taken from the general treasury of Respondent in maintaining the minimum standard of living for health, efficiency and general well-being of the worker. It could be used to the same extent in paying for food, shelter and clothing, upon which health, efficiency and general well-being depend.

The accounting and guarantee plan definitely insured the receipt by each red cap of 25 cents for each hour of work. If the tips reported by a red cap did not equal the

minimum of 25 cents an hour, Respondent paid him the deficiency. Consequently, the purpose of the Act was accomplished in the case of red caps.

That the accounting and guarantee plan fully complied with the purpose of the Act was pointed out forcibly by the court in **Williams v. Jacksonville Terminal Company**, 35 F. Supp. 267:

> "The intent of an act is the essence thereof, and the intent thereof should be given effect as against the mere words of an act when the mere words, construed alone, would produce legislative or judicial brigandage. The Court believes that the wording of the Act in defining 'wages' provides that things other than the direct payment of money can be used in the payment of wages. The plaintiffs here were paid in money, but in an indirect way—through facilities afforded the plaintiffs by defendant. No question of determination of 'reasonable cost' is involved. They were compensated in money which the defendant had the legal right to collect and to keep if it rendered the services through its employees as contended. There can be no substantial difference between compensation for services rendered and wages for services rendered.
>
> "Congress intended to secure to employees at least a minimum compensation for the hours of service performed. It never intended that Section 6 of the Act should do more than that. In the present case the plaintiffs, as a group, received out of their relationship, or employment, some $3,000.00 in excess of the minimum wage required by law. They here seek to be paid again all sums which they have received out of their relationship, or employment, plus an equal amount as liquidated damages, plus attorney's fee. I subscribe wholeheartedly to the real purpose of the Act as I conceive it, but I cannot ascribe to Congress the superlative folly of intending that an employee, under the circumstances of this case, wherein no element of willfulness is involved, should recover the minimum wage thrice multiplied."

B. Language of the Act

It is next necessary to determine whether the language of the Act, other than that of the preamble, requires that the Act be construed so as to insure not only a minimum wage but also a method of securing the wage which would result in this particular class of Respondent's employees receiving, in a majority of cases, double the minimum income assured by the Act. Such a construction of the Act plainly does not serve its policy and purpose. Does the language of the Act justify a construction not in keeping with such policy and purpose?

The Petitioner argues that Congress has used "words" and he wants these words, "Every employer shall pay * * * wages" construed as meaning that dollars must move manually from employer to employee. We will undertake to show that they cannot be applied as Petitioner desires without producing results which are contrary not only to the sense in which Congress used them as shown by the provisions of the Act itself, but also to dictionary definitions, decisions of the courts, and decisions of administrative tribunals.

1. Reasonably construed, the words "shall pay wages" do not require an employer manually to transfer payments from its general treasury to the employees, and "tips" (paid for services rendered by the employer and retained by the employee by permission of the employer) are embraced within the meaning of these words if accounted for and guaranteed as is here the case.

(a) Section 6 provides that "(a) Every employer shall pay to each of his employees who is engaged in commerce

* * * wages * * * at the rate of not less than 25 cents an hour during the first effective year of the Act, etc." As stated in **Lincoln v. Ricketts**, 297 U. S. 373, a settled rule of statutory construction is to give the words "their natural significance," and that will be our purpose here.

The meaning of the word "pay" is the first important determination to be made in this section of the Act, inasmuch as its meaning is significant in determining whether there must be a manual transfer of wages from the employer to the employees. In this regard, it is clear from the standard dictionary definition of the word "pay" that no manual transfer of wages is a prerequisite to the "payment" of wages. Standard definitions of the verb "pay" include the following: "to satisfy (another person) for services rendered, property delivered, etc.; to discharge one's obligation to; to make due return to; to compensate; remunerate; recompense; requite; as to pay workmen or servants." Also, among its common synonyms are such words as recompense, requite, reward, repay, satisfy, compensate, remunerate, reimburse, indemnify.* From the above definitions of the verb "pay," and its synonyms, it is manifest that a very common meaning of "pay" is to discharge one's obligation to a person for services rendered or to satisfy or compensate that person for services rendered. So far as "pay" is concerned there is nothing in the standard dictionary definition or synonyms of the word that indicates that the discharge or satisfaction of the obligation for services rendered or the compensation for services rendered must be by a manual transfer

* See Webster's International Dictionary, 2nd Edition.

of money or other medium of payment from the payor to the payee.

It is to be noted that Congress does not use the word "wages" uniformly throughout the Act when referring to an employee's remuneration. Thus, Section 7 limits the number of hours in the work week "unless such employee **receives compensation** for his employment in excess of the hours * * * specified at a rate not less than one and one-half times the regular rate at which he is employed." If, as Petitioner argues, the word "wages" has such a narrow meaning as to exclude the consideration of tips and was used by Congress with the definite purpose of excluding the use of tips in payment of wages, why did not Congress use the term 'wages' in Section 7? Compensation is generally understood to include within its meaning an equivalent or recompense, or something which compensates for loss or privation,* and under the company's accounting and guarantee plan tips were a recompense or remuneration received by the red caps in the course of their employment and must therefore be considered in determining overtime compensation.

Let us see what absurd results are produced by giving to the words of Sections 6 and 7 of the Act the meaning Petitioner would give to them. Section 6 provides that every employer shall pay a wage of 25 cents or 30 cents per hour. The Petitioner claims that this requires the employer to make manual delivery of these amounts. Section 7 provides, in substance, that when services are rendered over 40, 42 or 44 hours per week, the employee shall

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* See Webster's International Dictionary, 2nd Edition.

receive compensation of 37½ cents (1½ x 25¢), or 45 cents (1½ x 30¢) per hour for the overtime hours. If Petitioner's construction of these two sections is carried to a logical conclusion, the result would be that for the first 40, 42 or 44 hours, the employer must pay 25¢ or 30¢ per hour from his general treasury funds, but for the overtime hours tips may be used in computing the entire compensation or, at the least, in computing the overtime compensation (50% of the base wage). Such a result is unthinkable.

Of course every legislative act which involves payment of wages, treats and refers to wages as consideration or remuneration moving from employer to employee. The existence of the relationship assumes that the consideration or pay for the services performed so moves. If the consideration for services did not come from the employer, the latter would not have the right to direct the details and manner of work, and the relationship of master and servant would not exist. All Workmen's Compensation Acts, so far as we know, speak of consideration or pay received by the employee from the employer. That is particularly true of the Texas Workmen's Compensation Act; and yet, despite the language contained therein defining wages as remuneration "which the employee **receives from the employer**" (Article 8309, Vernon's Annotated Texas Statutes) the Texas courts uniformly hold that tips received from a third person for whom the employer is rendering a service through his employee are within such definition and are wages received from the employer. (See **Federal Underwriters Exchange v. Husted**, 94 S. W. (2d) 540, and authorities cited therein, and more particularly referred to hereinafter.)

In effect, Petitioner argues that under the language of Section 6 of the Act, an employer is not paying wages to an employee even though he is seeing to it that funds in equal amount belonging to him are received by the employee. Suppose A is an employer, subject to the Fair Labor Standards Act, who manufactures and sells goods and he employs B as a salesman; A places in B's hands an article that A is offering for sale at a price of $10.00 and A agrees to pay B 10% on his sales. A of course must comply with the Fair Labor Standards Act by guaranteeing the minimum wage to B. B then sells the article for $10.00 and retains $1.00 (being 10% under the agreement). Has A not paid B the $1.00, or must A pay him a full minimum wage in addition merely because, as argued by the Petitioner, the $1.00 was placed in B's hands by A's patron and did not move manually and directly from A? That is the exact burden of Petitioner's argument in urging the adoption of his construction of Section 6 of the Act.

(b) There is no implication in the provisions of Section 3(m) as argued by Petitioner (page 69) that tips may not be accounted for as wages in satisfaction of the requirements of Section 6.

In Section 3(m) "wage" is described as including certain remuneration received in other forms than cash, the Act reading:

> "(m) 'Wage' paid to any employee includes the reasonable cost, as determined by the administrator, to the employer of furnishing such employee with board, lodging or other facilities if such board, lodging or other facilities are customarily furnished by such employer to his employees."

It is well known that employees often live in lodgings provided by their employers or are furnished board by their employers. Obviously, the furnishing of these and similar facilities does not amount to payment in cash or in negotiable instruments payable at par, the usual media for wage payments in connection with which there is no question of the value of the payment. It was clear that the employer might place an inflated value on lodgings and other facilities furnished to an employee and that where such facilities had not been furnished by the employer in the past to employees, or by employers in similar businesses, employers might force such facilities on employees in an attempt partly to discharge the obligations imposed by the Act. Therefore, the wording of Section 3(m) was designed to protect employees from unreasonable "wage" credits based on the value of lodgings and other facilities, which would give the employer a profit in the furnishing of the facilities, and to prevent such "wage" credits where such facilities are not customarily furnished. That this is the purpose of Section 3(m) is supported by Interpretative Bulletin No. 3, Wage and Hour Division, entitled "General statement as to method of payment under the Fair Labor Standards Act," dated October 21, 1938, as revised August 1, 1940, in which it is stated that:

> "It is Section 3(m) which permits and governs the payment of wages **in other than cash.**"

Employees are ordinarily paid for their services in cash or by check. The payment of tips is in cash, and when accounted for under a plan such as that instituted by the Respondent, cannot conceivably result in any profit to the

employer. It is absurd to emphasize that Respondent's patrons pay the tips and that therefore the employer profits, for in every "service" business funds with which employees are paid only exist because of payments by patrons for services performed by the employees. Therefore, the specific provision in Section 3(m) with regard to media for the payment of wages which are in no respect similar to the "cash" medium of payment involved in tipping under the accounting and guarantee plan can be of no moment in determining the question here under consideration.

As the Circuit Court in the case of **Williams et al. v. Jacksonville Terminal Co., supra**, said:

> "The provision of Section 3(m), 29 U. S. C. A. Sect. 203(m), 'Wage paid to any employee includes reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging or other facilities * * *,' refers to wage payments other than in money, and has no bearing upon the case. No credit on wages is claimed by reason of anything furnished, except the money retained by the employee."

Congress has, when it so desired, expressly excluded tips in dealing with compensation. In this connection a very pertinent discussion is found in the **Matter of Regulations Concerning Class of Employees and Subordinate Officials to be Included within the Term "Employee under the Railway Labor Act,"** 229 I. C. C. 410, 416, 417. In that proceeding the Interstate Commerce Commission found that red caps were employees within the meaning of the Railway Labor Act even though they received no compensation except from tips. In considering this question the Commission was confronted with the fact that persons

who receive no compensation other than from tips are not subject to the Railroad Retirement Act of 1935,* and in this regard stated, in part, as follows:

> "The Railroad Retirement Act of 1935, as amended June 24, 1937, specifically provides that persons who receive no compensation other than tips are not subject to that act. * * * From the fact that persons who receive no compensation other than tips are not excepted, as is the case in the Railroad Retirement Act, it may be presumed the Congress did not intend to restrict the Railway Labor Act."

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* It is of peculiar interest to note that while the Railroad Retirement Act specifically excludes tips, nevertheless after the adoption of the accounting and guarantee plan, the General Counsel of the Railroad Retirement Board held (see October, 1941, Bulletin of Railroad Retirement Board, p. 20) that the pay received by red caps under such plan was not included in such exclusion. After setting out the plan (identical with Respondent's notice of October 22, 1938) and calling attention to Section 1(h) of the Act reading:

> "The term 'compensation' means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers. Such item does not include tips. * * *"

it was stated:

> "The question then is whether under the arrangement in question it is 'tips' as above described which the 'red cap' 'earns' or which is 'payable' to him for his services to his 'employer.' That question can be answered only in the negative. In place of an arrangement whereby the red cap (insofar as he received gratuities from railroad patrons) had no claim whatever against the employer, and the red cap was under no obligation to account for his receipts from his employer's patrons, we have an arrangement for a definite guarantee that the red cap will be compensated in 'not less than' a certain minimum amount, and an explicit engagement by the employer to permit the 'red cap' to retain all gratuities received from the employer's patrons subject to their being reported and credited against the guaranteed amount. There are material differences between the situation existing under the former arrangement (the one which Congress had in mind in excluding 'tips' from 'compensation') and the one in question in view of the added obligations under the latter on both the red caps and the employer. When these material differences are considered together with the fact that there has been removed the administrative difficulty involved in crediting payments received in the form of 'tips,' which difficulty was the principal reason Congress had for excluding such payments, it cannot be doubted that whatever the red cap earns under the guarantee arrangement, it is not such 'tips' as Congress had excluded from 'compensation.'"

The foregoing interpretation of the Railway Labor Act by the Interstate Commerce Commission is based on a rule of construction often prescribed by this court. Thus in **Keifer and Keifer v. Reconstruction Finance Corporation**, 306 U. S. 381, the court had to determine whether the Regional Agricultural Credit Corporation was subject to suit where the cause of action sounded in tort. Pertinent to our present problem are the following remarks of the court (pp. 385, 396):

> "When it chose to do so, Congress knew well enough how to restrict its consent to suits sounding only in contract, even with all the controversies in recondite procedural learning that this might entail. * * * In the light of these statutes it ought not to be assumed that when Congress consented to suit without qualification, the effect is the same as though it had written in suits on contract, express or implied, in cases not sounding in tort. No such distinction was made by Congress, and no such interpolation into statutes has been made in cases affecting government corporations incorporated under state law or that of the District of Columbia. There is equally no warrant for importing such a distinction here."

It should be said with equal justification here that it ought not to be assumed that when Congress used the term "wages" it meant the same thing as if it had written "wages (but wages shall not include tips)." On the contrary, in view of the foregoing express provision in the Railroad Retirement Act and the settled rule of statutory construction adopted by the Commission and the Supreme Court in the foregoing cases, Respondent submits that the failure of Congress to "put into the Act anything else under the head of wages which might be construed into an exclusion of tips" is a manifestation of the fact that

Congress did not intend that the term "wages" should not include tips.

2. In other social legislation the words "shall pay wages" or words of substantially the same connotation have been held to include tips within their meaning.

It is submitted that it has now been shown that the accounting and guarantee plan was consistent with the purpose of Congress; that a contrary construction would not serve that purpose in any respect, and that the bare language of the Act does not in any way impel an interpretation of Section 6 which would not have any relation to the Congressional intent. These compelling arguments clearly support Respondent's position that its accounting and guarantee plan fully complied with the mandate of Section 6 of the Act. However, the interpretation of such words appearing in other statutes has been favorable to Respondent, and the term "pay wages" and words of substantially the same meaning, have not been interpreted to require the manual transfer of compensation for services rendered from the employer to the employee.

(a) The decisions under Workmen's Compensation Statutes support the Respondent's interpretation.

In **Sloat v. Rochester Taxicab Company, supra,** which has been quoted from hereinbefore, the court held that tips should be considered in determining the compensation payments to be made to an injured employee under the New York Workmen's Compensation law. In this regard, the pertinent part of the statute provided that the amount of the compensation should be based on:

> "The money rate at which the service rendered is recompensed under the contract of hiring in force at

the time of the accident, including the reasonable value of board, rent, housing, lodging or similar advantages **received from the employer.**"

The court pointed out that the employee could not have received the tips if the employer had not put him in the way of receiving them and concluded that tips should be included under the statute.*

Further support for Respondent's position is found in the Texas courts, which in two cases have determined that, under the Texas Workmen's Compensation Act, defining wages as remuneration "which the employee **receives from the employer,**" tips are wages. **Lloyds Casualty Company v. Meredith,** 63 S. W. (2d) 1051, and **Federal Underwriters Exchange v. Husted,** 94 S. W. (2d) 540. It is true that the Texas statute provides that compensation shall be based on wages and "other advantages received by the injured employee as part of his remuneration and which can be estimated in money," but the courts found tips to be "wages" under the statute and not "advantages," as is clearly reasonable since tips do not need to be "estimated in money."

Similarly persuasive is the decision of the Supreme Court of Maine in **Gross' case,** 166 A. 55. There the statute under consideration provided that compensation should be based on "wages, earnings, or salary," and that benefits received from any other source than the employer should **not** be taken into consideration. After considering and citing many compensation acts, and decisions construing them to include tips in the computation of average weekly wages; the court concluded that tips were not ben-

* To the same effect, **Bryant v. Pullman Company,** 177 N. Y. S. 488.

efits received from any other source than the employer. The court said: "No broad distinction between the word 'earnings' and the word 'wages' is apparent."*

The case of **Alexander Hamilton Hotel Corporation v. Board of Review of the New Jersey Unemployment Compensation Commission** (New Jersey), 21 A. (2d) 739, which is cited on pages 74 and 75 of the Petitioner's brief, is not entitled to weight. In the first place, a review of the authorities indicates that the rule in New Jersey is the minority rule. Again, the opinion shows that the Supreme Court of New Jersey was influenced by the fact that in the Workmen's Compensation Act of New Jersey tips are excluded in ascertaining wages. The court said (p. 743):

> "Moreover, our Workmen's Compensation Act embodies a policy different from most. In defining the term 'wages' it specifically excludes 'gratuities received from the employer or others.'"

Finally, the New Jersey Supreme Court was considering ordinary, unguaranteed tips, not accounted-for and guaranteed tips, such as we are considering in this case. Thus, in its opinion, the court discusses the Social Security Act and a ruling by the Bureau of Internal Revenue to the effect that tips not accounted for by the employee to the employer are not wages paid by or payable by the employer. (In the next subsection of this brief we show that the Bureau of Internal Revenue ruled, however, that accounted-for and guaranteed tips were wages paid by or payable by the employer. This distinction between guaranteed and unguaranteed tips must be borne in mind in

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* See also Powers' case, (Massachusetts) 176 N. E. 621.

considering State Unemployment Insurance and Minimum Wage Acts.)

(b) The federal and state social security laws support Respondent.

The Social Security Act contains the phrase "wages paid by him" (the employer) and the phrase "wages payable by him" (the employer). Under such statute so phrased the Bureau of Internal Revenue of the Treasury Department has determined that tips reported to the employer for the purpose of enabling the employer to compute the sum due the employee under a guaranteed income constitute wages paid by the employer or wages payable by the employer. In **Internal Revenue Bulletin No. 25**, issued on June 20, 1938, there appears on page 18 the determination of the bureau on this point:

> "Question 4. If a hotel or restaurant guarantees its waiters a fixed income consisting of remuneration paid by the restaurant and partly of the tips, does such a guarantee affect the status of the tips received by the waiters?
>
> "Answer. Inasmuch as the employer bases the remuneration of his employee on the amount of such tips, and since the employees must inform the employer of the amount of tips received in order that the latter may compute the balance due the employees, it is clear that such tips constitute 'wages' within the meaning of Titles VIII and IX of the Act."

In the above answer it is clear that the bureau determined that guaranteed tips were remuneration for employment and were wages paid or payable **by the employer.** The facts presented by this question are identical with the facts presented in the case now under consideration, and the bureau's answer is equally correct when applied to the

question of whether tips are wages under the Wage and Hour Act.

In his comments on these provisions of the Social Security Act and the ruling thereon (Petitioner's brief, p. 77) Petitioner ignores the fact that the "wages" defined in Sections 811 and 907 as being "remuneration" are wages which, according to Sections 1004 and 1101, must be **paid by** or **payable by** the employer.

(c) Interpretations of National Labor Relations Act support Respondent's contention.

The National Labor Relations Board, in ordering the reinstatement of waiters discharged for union activity, has directed in proceedings under the National Labor Relations Act that back pay be calculated on the basis of previous average income, including tips. **In re Club Troika,** 2 N. L. R. B. 90 (1936); **In re Willard,** 2 N. L. R. B. 1094 (1937). The Board in these cases was proceeding under a section of the National Labor Relations Act which authorized the Board to order "reinstatement of employees with or without back pay." The Board, then, must have determined that tips were "pay"—pay from the employer.

3. "Pay" and "wages" should not be construed narrowly so as not to include the tips accounted for under a guarantee plan since such a construction would lead to absurd and unreasonable results.

It will be recalled that this Court, in the case of **United States v. American Trucking Ass'n., supra,** stated that if a literal interpretation of a statute produces absurd or even unreasonable results, at variance with the policy of the legislation, this Court "has followed that purpose rather than the literal words."

In reaching the conclusion that tips were wages, the court, in **Sloat v. Rochester Taxicab Company, supra,** pointed out that the complainant employee received the same amount of wages by retaining his tips as if he had turned these tips back to his employer, and the employer had then returned an equal amount of money to the employee in payment for his services. As the court quite simply analyzed the situation, "If the employee receives from the employer $12.00 and retains the $5.10 in tips, he is getting through or from the employer $17.10 a week; and if the employer paid the employee $17.10 a week, and the tips were turned over to the employer, the result to each would be the same."

Certainly this statement is entirely sound and equally applicable to the present facts, and it illustrates the manifest absurdity of the interpretation of the Act contended for by the Petitioner who admits* that the red caps have received the minimum compensation provided by the Act —chiefly through tips—but denies that the tips, received and accounted for, may be taken into account in determining whether there has been a compliance with Section 6. In other words the Petitioner's position is that the requirement of the Act is met only if the employer, regardless of every other fact, manually transfers in cash to the employee from its general fund 25 cents and 30 cents per hour, and by adopting this position Petitioner completely disregards income to the employee and only considers expense to the company. It is clear that this construction of

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* It might be noted that in his written opinion Judge Atwell stated (Transcript of Record p. 285): "Counsel have called the court's attention to the fact, as disclosed by the stipulation and testimony, that the red caps who are suing here have already received a little more than they were receiving before the law was passed."

the Act would result in the receipt by the red caps not only of tips which in many cases approach or equal the minimum wage provided by Section 6, and which have been accounted for justly and fairly, but also of additional amounts directly from the company equal in amount to the tips received. It is difficult to conceive of a more absurd and unreasonable result than for this particular class of Respondent's employees to be entitled under the Act to substantially more compensation than the minimum provided by the Act. Such a construction, in effect, means that the Act was not only designated to assure a minimum living standard of wages but also to impose upon certain employers, with respect to certain employees, an expense over and above that necessary to provide those employees with the minimum standard of living wages.

To refuse to give effect to the accounting and guarantee plan, as the trial court erroneously refused to do, would single out red caps, and other receivers of tips, as special beneficiaries of the Act. Manifestly Congress intended the Act to operate uniformly upon all employees subject to its regulations; any other intention would be unreasonable and inequitable. The uniform result intended was that each employee should receive and retain a minimum of 25 cents for each hour's work. That result was accomplished for the red caps by the accounting and guarantee plan. Consequently that plan did not violate the Act. It would be an arbitrary and unreasonable interpretation of the Act to hold that red caps are in a preferred class, entitled to a bonus, while other carrier employees shall be guaranteed only the minimum wage.

POINT V

There was no abandonment of the accounting and guarantee plan by Respondent during the period from March 1, 1939, to October 15, 1939, as claimed by Petitioner under his Point V.

Argument in Support of Point V

In one short paragraph on pages 64 and 65 of his brief, Petitioner somewhat casually asserts that Respondent abandoned the accounting and guarantee plan between March 1, 1939, and October 15, 1939; because it adopted new forms of reports for use by its employees during such period.

The stipulation signed by both parties hereto and filed of record in the trial court specifically provided (Tr. of R. 130-132):

> "It Is Agreed * * * That prior to March 1, 1939, defendant prepared and furnished to the red caps, 'Red Cap Time Slip' forms, one of said forms being attached hereto and marked Exhibit 'C'; that prior to March 1, 1939, defendant advised the red caps that defendant would assume unless reported to the contrary, that for each work period after February 28, 1939, each red cap collected in tips at least an amount equivalent to the number of hours worked multiplied by twenty-five cents (25 cents), and that should any red cap receive less than said amount during any work period **he should report it to defendant and defendant would pay to such red cap** an amount equal to the difference between the amount of tips collected and the amount represented by multiplying the number of hours worked by twenty-five cents (25¢). * * *
>
> "It is agreed that during the period from October 24, 1938, through October 23, 1939, that defendant stood ready to and did pay to each red cap, for each work period during which the amount of tips collected

> by said red cap amounted to less than the number of hours worked multiplied by twenty-five cents (25¢), an amount equal to the difference between the amount of tips collected and the number of hours worked multiplied by twenty-five cents (25¢);"

In the short statement devoted to this point in Petitioner's brief it is conceded that:

> "It is true that the Respondent stood ready to pay the red caps if they reported their tips had not equalled the minimum wage,"

Respondent is not charged with any failure to pay the difference between the tips which it permitted its employee to retain and the minimum wage. Indeed, it is specifically agreed and stipulated to the contrary. Petitioner argues that some additional rights accrue to the red caps because during a certain period they were required to report only the difference between the tips received and the minimum wage, and because Respondent accepted the accuracy of its employees' reports without requiring detailed information covering the tips received and retained. It is admitted that the amounts thus received and retained by permission and agreement with Respondent were equal to or greater than the minimum wage. Respondent submits that this half-hearted suggestion of Petitioner is entitled to no greater consideration by way of reply than Petitioner gave to it in making the argument.

POINT VI

Liquidated or punitive damages are not recoverable in the absence of a showing of fraud, malice, willful violation of the law, or gross negligence; and there being no such showing herein, no recovery of liquidated damages can be had.

Authorities in Support of Point VI

Scott v. Donald, 165 U. S. 58;
Tilghman v. Proctor, 125 U. S. 136;
Tinker v. Scharnhorst, 263 P. 645;
United States v. Joseph G. Chouteau, 102 U. S. 603.

Argument in Support of Point VI

Section 16(b) of the Fair Labor Standards Act provides:

> "Any employer who violates the provisions of Section 206 or Section 207 of this chapter shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. * * *"

The trial court in its opinion obviously takes the position that if in any instance the full minimum wage is not paid to an employee the infliction of the penalty provided for under Section 16(b) of the Act is mandatory under the statute, and the following language of the trial court is significant: "The third question is somewhat more difficult. It is more difficult because the penalty of the statute makes the burden heavy on the erring employer."

There is no evidence in the present case to indicate either directly or by implication that Respondent either willfully,

fraudulently, or maliciously violated the Act. Even if violation is admitted purely for the sake of argument (and there is no admission of violation here), we submit that the mere fact that the Act was violated is not in and of itself sufficient ground upon which arbitrarily to impose the severe penalty provided for in Section 16(b). There is no distinction in law between the recovery of a penalty in a civil action or in a criminal prosecution. "Admitting that the penalty may be recovered in a civil action as well as by criminal prosecution, it is still punishment for the infraction of the law. This term "penalty" involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, either by a civil action or criminal prosecution." **United States v. Joseph G. Chouteau**, 102 U. S. 603, 26 L. Ed. 246. It is not disputed that Respondent made every effort to comply with the Act (and we submit has complied with it). The situation is not unlike one in which exemplary or punitive damages are allowed. In effect the civil penalty is identical with punitive damages. Where punitive or exemplary damages are allowed, malice or fraud (neither of which has been shown here) are necessary elements. "Damages have been defined to be the compensation which the law will award for an injury done, and are said to be exemplary and allowable • • • where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression. While some courts and text book writers have questioned the soundness of this doctrine, it has been accepted in England, in most of the states of this Union and has received the sanction of this court." **Scott v. Donald**, 165 U. S. 58, 41 L. Ed. 632. Again we find "Exemplary damages are imposed by the law upon the theory of

punishment of the offender for the general benefit of society and as a restraint to the transgressor and are allowed only in cases where malice, fraud, oppression or gross negligence enter into the cause of action." **Tinker v. Scharnhorst** (Oklahoma), 263 P. 645.

The mere violation of a statute in and of itself does not necessarily require the infliction of penalties. There is no proof in the record tending to establish any intentional, willful or malicious violation of the Act.

Other statutes contain provisions for liquidated damages, for example, the patent statute; and yet the courts have held uniformly that the penalty would only be inflicted where the circumstances require it. "* * * But the court may, whenever the circumstances of the case appear to require it, inflict vindicative or punitive damages by rendering judgment for not more than thrice the amount of the verdict." **Tilghman v. Proctor**, 125 U. S. 136, 31 L. Ed. 664, 666.

We submit that when, as here, an employer has taken every means to comply with the Act, the imposition of a penalty is unwarranted even if the court should ultimately find that the employer had misconstrued the statute.

CONCLUSION

Respondent submits that it had the legal right to exercise control and ownership over the "tips" which were the sole compensation paid by its patrons for services rendered by it through its red cap employees; that it exercised such right of control and ownership through its notice of October 22, 1938; that while an acceptance of such action was unnecessary, nevertheless the red caps who, on and after October 24, 1938, continued in the service of Respondent, handling hand baggage, receiving and reporting tips, receiving and retaining checks covering any deficiency, and otherwise complying with the terms of the notice of October 22nd, did accept such notice and are bound by the terms thereof; that no showing has been made of a violation by Respondent of the Railway Labor Act or the Interstate Commerce Act, and that such Acts provide their own remedies and do not affect Respondent's compliance with the Fair Labor Standards Act; and finally that Respondent has complied fully with both the purpose and the language of the Act, has paid the red caps their wages amounting to more than $38,626.99, and that Petitioner cannot recover such wages over again in this proceeding.

WHEREFORE, Respondent prays that the judgment of the Circuit Court be affirmed.

Respectfully submitted,

Robert G. Payne

Attorney for Respondent

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Nos. 1023 (1940 Term), 112

In the Supreme Court of the United States

OCTOBER TERM, 1941

C. L. WILLIAMS ET AL., PETITIONERS

v.

JACKSONVILLE TERMINAL COMPANY

A. J. PICKETT, GENERAL CHAIRMAN OF THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, DULY AUTHORIZED REPRESENTATIVE OF JAMES FOSTER AND OTHERS, PETITIONERS

v.

THE UNION TERMINAL COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

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BRIEF ON BEHALF OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, AS AMICUS CURIAE

The Administrator of the Wage and Hour Division of the United States Department of Labor is charged with the responsibility and duty of ad-

ministering and enforcing the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060, 29 U. S. C., Supp. V, Sec. 201, *et seq.*). Because these cases present significant questions of interpretation of the Act and of the rights and liabilities of employees and employers thereunder, the Administrator submits this brief as *amicus curiae*.

The Wage and Hour Division in 1939 conducted an investigation of the operation of the accounting and guarantee arrangement involved in these cases. The report of the presiding officer, which describes the machinery and the effects of the system, and the way it functions, is set forth in the record in the *Williams* case (No. 112, R. 148–164). The Administrator has since caused two injunction suits to be instituted against terminal companies whose redcaps were employed under plans identical with those established by the respondent companies.[1] The background and history of the problem are also outlined in a report, dated November 30, 1940, from the Administrator to the Chairman of the Senate Committee on Education

[1] *Fleming* v. *Cincinnati Union Terminal Company* (S. D. Ohio) No. 123; *Fleming* v. *Cleveland Union Terminals Co.* (N. D. Ohio), No. 20225. Both of these cases are still pending. The district court in the *Cincinnati* case dismissed the complaint on grounds of mootness because of substitution of a 10¢ a bag plan for the accounting and guarantee plan, but this decision was reversed by the Circuit Court of Appeals for the Sixth Circuit, 117 F. 2d 1012. The case has been remanded for trial, but not yet tried.

and Labor, on the then pending Senate Resolution No. 325, 76th Cong., 3d Sess. This report, which is part of the committee files on Senate Resolution No. 325 (see S. Rept. 260, 77th Cong., 1st Sess.), has been printed as Appendix B to the memorandum filed in this Court by the Administrator as *amicus curiae* in support of the petition for certiorari in No. 1023.[2]

OPINIONS BELOW

The written opinion of the district court in the *Pickett* case (No. 1023, R. 281–290) is reported in 33 F. Supp. 244. The opinion of the district court in the *Williams* case (No. 112, R. 195–203) is reported in 35 F. Supp. 267. The opinions of the Circuit Court of Appeals in the *Pickett* case (No.

[2] The 76th Congress, 3d Session, in which Senate Resolution No. 325 was pending, ended before the Resolution was acted upon. In the 1st Session of the 77th Congress, Senate Resolution No. 105, substantially identical with the previous Resolution, was adopted by the Senate on May 15, 1941. Senate Resolution No. 105 directs the Administrator to investigate the conditions and practices of employment of redcaps and the extent to which such conditions and practices violate the letter or spirit of the Act. The Administrator is also directed to make recommendations as to "what legislation, if any, should be enacted for the purpose of further regulating wages, hours, and other conditions and practices of employment of redcaps" under the Act. Pursuant to this direction, the Administrator has held public hearings, participated in both by redcaps and carriers, in Chicago, St. Louis, New York, and Washington, D. C., with further hearings already scheduled for Dallas. The Administrator's report to the Senate will be made after the conclusion of the hearings.

1023, R. 301–303) and in the *Williams* case (No. 112, R. 214–222) are reported in 118 F. (2d) 324 and 328.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 4, 1941. Petitions for writs of certiorari were granted by this Court on October 13, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether tips given to redcaps by train passengers may be considered part of the wages which respondents are required to pay to their employees under Section 6 of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C., Supp. V, Sec. 201, *et seq.*, read as follows:

> Sec. 6. (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) during the first year from the effective date of this section, not less than 25 cents an hour,
>
> (2) during the next six years from such date, not less than 30 cents an hour.[3]
>
> * * * * *

[3] Pursuant to authority conferred on him by Section 8, the Administrator promulgated a wage order, effective March 1,

SEC. 3. As used in this Act—

* * * * *

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees.

Section 16 (b) permits employees who have not received the minimum wage provided for by Section 6 to institute suit, in their own names or through a designated agent or representative, for the unpaid minimum wages plus an additional equal amount as liquidated damages, and for attorney's fees.

STATEMENT

The facts in the two cases are substantially identical.[4]

The primary duty of redcaps is to carry the baggage of passengers alighting from and boarding trains arriving at and departing from railroad

1941, setting the minimum wage rate applicable to employees of Class I railroads at 36 cents an hour, and, for employees of short line railroads, at 33 cents an hour. Title 29, Chapter V, Code of Federal Regulations, Part 591 (published in the *Federal Register* on February 14, 1941).

[4] Some of the familiar facts as to what redcaps do and as to the general understanding of the parties when tips are received are not specifically set forth in the testimony but were judicially noticed in the lower courts (No. 112, R. 201, 217-218; No. 1023, R. 286). Since such facts are of common knowledge, this Court may also take judicial notice of them.

terminals (No. 1023, R. 124, 203; No. 112, R. 8–9, 86). For many years prior to the effective date of the Fair Labor Standards Act and during the period in question here, respondents made no charge to the passengers for the services of the redcaps and paid the redcaps no wages (No. 1023, R. 202–205; No. 112, R. 85–91). The redcaps were required to render service to passengers whenever requested but were forbidden to solicit tips or make any charge (No. 1023, R. 173, 203–205; No. 112, R. 91). Although the passengers were under no legal obligation, either to respondents or to the redcaps, to pay for the latter's service, most passengers rewarded the redcaps with tips (No. 1023; R. 204; No. 112, R. 87). The tips varied in amount, depending upon the number of packages carried by the redcaps, their efficiency and affability, the financial ability and temper of the passengers and other cognate factors (No. 112, R. 85–91, 201; No. 1023, R. 204–205). The passengers giving tips did so with the intention of having the redcaps keep them and with the understanding that such was the prevailing practice (No. 112, R. 217–218). During the period before the passage of the Act the redcaps relied for their income exclusively on tips given by passengers (No. 1023, R. 46–47, 174, 202; No. 112, R. 85, 89), and respondents never claimed ownership of the tip money (No. 1023, R. 48–49, 206–207; No. 112, 86, 88, 91).

On September 29, 1938, pursuant to authority granted in Section 1, Fifth, of the Railway Labor

Act, the Interstate Commerce Commission held redcaps to be employees of the carriers. *Ex Parte* No. 72 (Sub. No. 1) 229 I. C. C. 410 (September 29, 1938); 232 *Id.* 49 (No. 1023, R. 177–195). On October 24, 1938, the Fair Labor Standards Act became effective.

In Dallas on October 22 and in Jacksonville on October 24 respondents delivered to each of their redcaps a copy of the following identical notice (No. 1023, R. 127–128; No. 112, R. 121–122):

> In view of the requirements of the Fair Labor Standards Act, effective October 24, 1938, and in consideration of your hereafter engaging in the handling of hand baggage and traveling effects of passengers or otherwise assisting them at or about stations or destinations, it will be necessary that you report daily to the undersigned the amounts received by you as tips or remuneration for such services.
>
> The carrier hereby guarantees to each person continuing such service after October 24, 1938, compensation, which together with and including the sums of money received as above provided, will not be less than the minimum wage provided by law.
>
> You are privileged to retain subject to their being credited on such guarantee all such tips or remuneration received by you except such portion thereof as may be required of you by the undersigned for taxes of any character imposed upon you by law and collectible by the undersigned.

> All the matters above referred to are subject to the right of the carrier to determine from time to time the number and identity of persons to be permitted to engage in said work and the hours to be devoted thereto, to establish rules and regulations relating to the manner, method and place of rendition of such service, and the accounting required.

There is no indication that respondents informed travelers by publication or otherwise of the inauguration of this "accounting and guarantee" system (No. 1023, R. 23; No. 112, R. 10, 219).

In each case the chosen representative of the redcaps promptly protested against respondents' attempt to include tips within the wages due the employees under the statute (No. 112, R. 72, 78–79; No. 1023, R. 128–130).[5] Attempts by these representatives over a long period to reach agreements with respondents on the question were unsuccessful (No. 1023, R. 153–154, 198–199; No. 112, R. 72–73, 76–79, 125–128), although agreements governing terms of employment other than wages were finally signed (No. 112, R. 73, 107–116; No. 1023, R. 126, 134). Respondents' position in each instance was that they were entitled as a matter of law to include tips in wages, and that they would enter into no agreement on that subject until after the matter had been determined by the courts (No. 1023, R.

[5] In Dallas the first protest was made on October 24th, two days after the plan was announced and the day it was to become effective (No. 1023, R. 128–130), and in Jacksonville on November 4th, eleven days after announcement of the plan. (No. 112, R. 72).

134, 153–154, 287; No. 112, R. 76–78, 81–84, 125–126, 136–137, 216). Respondents never claimed, however, that the redcaps had voluntarily agreed to their accounting and guarantee plan (No. 112, R. 136–137, 198; No. 1023, R. 134, 286, 287).[6] No agreement was ever reached as to the disposition of the tips.

While the negotiations were going on and despite the protests, the plan set forth in the notice was put into effect. From October 24, 1938, through the period covered by these cases the redcaps were required to file reports showing the hours worked and their tips,[7] and the respondents paid the redcaps the amount, if any, by which the statutory minimum wage exceeded the tips reported (No. 1023, R. 124, 131–132, 212; No. 112, R. 11, 47–50). On July 1, 1940, the Jacksonville terminal abandoned the accounting and guarantee plan and substituted a plan under which it paid the redcaps the statutory minimum wage and charged the passengers 10 cents a bag (No. 112, R. 64–65).

It is clear that the redcaps were engaged in interstate commerce and that they were employees

[6] We do not mean by this that the attorneys for respondents in this litigation have not argued that the redcaps must be taken to have accepted the plan as a matter of law, but only that respondents understood in fact that there had been no meeting of minds.

[7] Between March 1, 1939, and October 15, 1939, the Dallas terminal assumed that tips were equal to the statutory minimum unless a report to the contrary was filed (No. 1023, R. 130–131).

of respondents. We do not believe that respondents in this Court will challenge either of these propositions.

The redcaps in Jacksonville and Dallas through their collective bargaining representatives brought these suits, pursuant to Section 16 (b) of the Fair Labor Standards Act, to recover the difference between the amounts respondents had paid them and the statutory minimum wage. In the *Pickett* case the district court held that the tips when given were the property of the redcaps, that there had been no agreement between the redcaps and the carriers whereby the tips became the property of the latter, and that accordingly the tips could not be considered wages paid by the employer as required by Section 6 of the Act (No. 1023, R. 276–290). The district court in the *Williams* case held, on the contrary, that redcaps were not employees of the carrier, but that even if they were, the tips were received through "facilities" ("the Station and the passengers" (No. 112, R. 200)) furnished by the carrier, and that Section 3 (m) of the Act permitted tips to be included in the minimum wage because of this fact (No. 112, R. 200–202).

The circuit court of appeals, Judge Holmes dissenting (No. 112, R. 221; No. 1023, R. 303), reversed the *Pickett* decision and affirmed the *Williams* decision, although rejecting both of the reasons advanced by the district court in the latter case (No. 1023, R. 301–302; No. 112, R. 214–221).

The opinion of the circuit court of appeals recognizes that tips, before the enactment of the Fair Labor Standards Act, were the property of the redcaps and that there had been no agreement between the parties altering this situation. The court held, however, that the Fair Labor Standards Act itself, without regard to the consent of the parties, converted the tips into the property of the employer and that accordingly the receipt of tips from passengers constituted the payment of wages by the employer.

SUMMARY OF ARGUMENT

Section 6 of the Fair Labor Standards Act requires the employer to pay minimum wages to his employees. The giving of tips by passengers is clearly not the payment of wages by the employer within the meaning of the words used in the statute.

A. Tips were unquestionably the property of the redcaps at the time the Fair Labor Standards Act was passed. Nothing in the Act supports the conclusion of the circuit court of appeals that the statute in and of itself converted the tips into the property of the employer. Nor may tips be included in wages on the theory that they result from any facilities ("the Station and passengers") furnished by the carrier within the meaning of the definition in Section 3 (m). That section on the contrary is an indication that Congress did not intend to expand the definition of wages so as to bring tips within it.

The employers did not have the right to make the tips their property without the consent of the employees. The relationship of agency, or master and servant, is consensual. Except where an agreement may be implied in fact, the master may not unilaterally determine their conditions of employment.

B. The three lower courts found that the redcaps did not in fact consent to or acquiesce in respondents' plan. On the contrary they protested against it, and both parties understood that the issue was one which would be determined by the courts. Respondents' argument assumes that by reason of the redcaps' continuance at work under the plan, consent must be implied as a matter of law. But the implication of acceptance, commonly drawn from an employee's conduct in working for an employer, is one of fact, subject to rebuttal by a showing that there actually was no meeting of minds or manifestation of mutual assent.

In addition, provisions of the Railway Labor Act require that all disputes between carrier and employees be handled amicably in conference. This precludes an employer from unilaterally imposing terms of employment over his employees' protests and without collective bargaining. The policy of the Railway Labor Act that interstate transportation not be interrupted is inconsistent

with the contention that the employees forfeited their claim by remaining in service and seeking to settle the dispute peacefully instead of leaving their jobs as soon as the carriers' terms were made known.

C. Moreover, any consent by the redcaps to the "accounting and guarantee" plan would have been ineffective to waive their rights under the law. The plan did not provide that the tips were not to be the redcaps' property. The requirements of the Fair Labor Standards Act are not met if an employee is compelled to agree to surrender some of his own money to the employer in return for the statutory minimum wage.

ARGUMENT

TIPS GIVEN BY PASSENGERS TO REDCAPS ARE NOT PART OF THE WAGES RESPONDENTS ARE REQUIRED TO PAY UNDER SECTION 6 OF THE FAIR LABOR STANDARDS ACT

The issue before this Court is extremely simple. The Fair Labor Standards Act requires that "every employer shall pay" the prescribed wages to his employees (Section 6). Clearly, within the meaning of the words used, the giving of tips by passengers is not the payment of wages by an employer.

"To say that, within the intention of Congress as expressed in the Fair Labor Standards Act, the defendant paid wages to redcaps when it permitted them to accept tips from travelers is to

assume that Congress did not know the generally accepted meaning of simple words. But they did know the generally accepted meaning of simple words. They knew what the word 'wages' means in common, present day, understanding. They knew what a 'tip' is. Certainly any member of Congress would have been amazed if he had been told, when he handed to the bellboy in his Washington hotel a tip, that the hotel company was paying the bellboy his wages. If Congress had intended that tips should be included in the meaning of the word 'wages' it would have said so." (*Harrison* v. *Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, 437.)[8]

Respondents in the courts below have suggested a number of reasons for not giving the language of the statute its plain meaning. The arguments are divided into two main categories: (1) that the tips are to be counted as wages, irrespective of the consent or agreement of the redcaps, and (2) that the tips may be counted as wages because the redcaps have agreed to respondents' plan. The first of these contentions is, we believe, erroneous as a matter of law, and the second is contrary to the findings and evidence in both of these cases.

[8] In the case cited Judge Otis concluded that the redcaps had agreed that the tips became the property of the carrier, and that by reason of such agreement the tips were properly included in the wages paid. His opinion expressly differentiates the case before him from the present cases, in which no such agreement appears. (36 F. Supp., at 437–438, n. 6; see pp. 26–31, *infra*.)

A. THE RECEIPT OF TIPS FROM PASSENGERS IS NOT THE PAYMENT OF WAGES BY THE EMPLOYER

1. *The tips were the property of the redcaps*

The statute requires that the employer pay the wages to the employee. This mandate, as the circuit court of appeals recognized (No. 112, R. 219), cannot be carried out unless some property or funds of the employer are transferred to the employee.[9]

There would seem to be no question that, before the passage of the Act and the notice given by respondents, the tips given by passengers were the property of the redcaps.[10]

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[9] Respondents argue that the statutory requirement that the employer pay wages does not require it "manually to transfer" money from its general treasury to its employees. Dictionary definitions are cited to the effect that "pay" means "satisfy or discharge obligations." All this can be conceded. But *the employer* does not pay, within the meaning of the Act, unless the obligation is discharged, whether by manual transfer or otherwise, out of his own funds or property. To take the illustration used by the circuit court of appeals, a trolley conductor may be paid out of funds collected without any manual transfer of funds, but he is paid by the employer, because the money which he retains as a wage is his employer's property. Since the tips are the property of the redcaps and not of the employer, the employer is not paying when the redcaps retain the tips.

It is also contended that the employer is entitled to credit for amounts set off against debts owed by employees, and that the tips were owed by the redcaps to the employer. This argument begs the question, for its premise is that the tips belonged to the employer. This assumption is, we believe, unsound. See pp. 15–19, *infra*.

[10] In the absence of legislation, tips are considered the property of the employee and, as such, recoverable from the

The widespread practice of tipping redcaps stemmed from the public's knowledge of the relationship between porters and their employers. Passengers, aware that redcaps received no wages from the carriers and that their earnings depended upon public solicitude, gave tips to the redcaps on the assumption that the tips would be retained by them. The passengers' intention coincided with the understanding between the redcaps and the terminal companies. The porters, viewing the tips as their personal property, always retained the gratuities collected. Taking a similar view of the ownership of the tips, the terminal companies never asserted a claim thereto. The intention of the passengers in giving and of the redcaps in receiving the gratuities combined to make the tip money the property of the porters.[11]

T is, the circuit court of appeals agreed, was the situation before the passage of the Act (R. 218). But it is asserted that the enactment of the statute effected a shift in ownership from the porters to respondents, without regard to the consent of the redcaps or the intention of the passengers (No. 112, R. 218). The court does not refer

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employer when turned over to him by mistake. *Zappas* v. *Roumeliotis*, 156 Iowa 709, 137 N. W. 935 (1912); *Poates* v. *Barlin*, 149 Ky. 376, 149 S. W. 828 (1912); *M'Rae* v. *M'Beath* (1847), 5 N. B. 446; Note 13 A. L. R. 905, 921; and see American Law Institute, *Restatement of the Law of Agency*, pp. 871–872.

[11] These facts, which are of common knowledge, were judicially noticed by the circuit court of appeals (No. 112, R. 217–218).

to any section of the Act which sanctions or impels such a result. The statute, we submit, contains no provision which purports to take away from any employee property which otherwise would be his. The tip money, indisputably the property of petitioners before the Act, did not automatically become the property of respondents through passage of the statute.

The rationale of the decision below seems to be that respondents, through their redcap employees, rendered porter service to passengers and that the tips accordingly constituted payment by the passengers to respondents for such service. But this was no more the case after than before the Fair Labor Standards Act, and it was conceded by the court below that before the passage of the Act the tips were the property of the redcaps and not of respondents (No. 112, R. 218).

It is, of course, clear that the passenger does not pay a tip to satisfy any obligation imposed by the carrier. Although such service may be a transportation service for which respondents could have charged passengers,[12] the record establishes that, prior to the Act and during the period of the "accounting and guarantee" plan, respondents did not

[12] *Stopher v. Cincinnati Union Terminal Co.*, 246 I. C. C. 41 (1941). Payment of the fare for transportation may be taken to include payment for redcap service in the absence of any additional charge. *Franklin* v. *Southern Pac. Co.*, 203 Cal. 680, 265 Pac. 936 (1928), certiorari denied, 278 U. S. 621; cf. *Herbert* v. *Shanley Co.*, 242 U. S. 591.

impose such a charge. For not only did respondents not compel passengers to pay a specified fee for the service;[13] the passengers were not required to pay anything, and the redcaps were forbidden even to suggest that any compensation was due. If the payment is not made in fulfillment of an obligation, it plainly is a gratuity, irrespective of the compunctions which a non-tipping passenger may feel. The effect of the decision below is to hold that the passengers, despite their actual intention that the tips be retained by the redcaps, are in fact unknowingly conferring a gratuity upon the terminal company.

The circuit court of appeals (No. 112, R. 219) and respondents have sought to support the "accounting and guarantee" plan by analogizing the redcap's position to that of a trolley conductor or salesman who, with his employer's authorization, takes his salary out of fares or commissions collected from passengers or customers. But the

[13] The Interstate Commerce Act (Sections 2 and 6 (7)) requires that all charges for transportation service be uniform, and that they be filed with the Interstate Commerce Commission. Since tips given were permitted to vary with the whim of the passenger, they cannot be treated as payments of charges or legal obligations imposed upon the passenger without attributing to respondents a violation of specific and familiar provisions of the Interstate Commerce Act. The Commission recently held that, during the period of the "accounting and guarantee" plan, the Act was inapplicable because "service was, until recently, rendered without a direct charge to the passenger." *Stopher* v. *Cincinnati Union Terminal Company*, 246 I. C. C. 41, 46.

trolley passenger or the purchaser from the salesman is legally indebted to the employer; all the parties to the transaction understand that he is discharging his obligation to the employer when he pays the employee, and that the money paid and retained by the employee belongs to the employer. The absence of these vital factors when tips are paid to redcaps makes the analogy entirely inapposite.

2. *Section 3 (m).*

The district court in the *Williams* case (No. 112) came to the conclusion that "the Station and passengers" were facilities furnished by the employer within the meaning of Section 3 (m) of the Act, which defines wages to include the reasonable cost of furnishing employees "with board, lodging or other facilities" (No. 112, R. 200–202). The circuit court of appeals properly found that the terminal was not a facility furnished to redcaps, but something "which the employer keeps for use in his own business" (No. 112, R. 220). It is obvious that the station and passengers do not fall within the class of "board, lodging, and other facilities" treated in Section 3 (m).

This section nevertheless is not without significance. It shows that Congress was concerned as to the definition of "wages" as used in the Act. Congress was undoubtedly as "familiar with the tipping practice" (No. 1023, R. 290), as with the deductions permitted by Section 3 (m); its failure

to include tips within the definition is an indication that, insofar as tips were concerned, the term "wage" was to be given its ordinary meaning.

3. *The power of the employer to make the tips his property*

Respondents argue that irrespective of anything in the statute or the consent of the employees, the employer has the right to assume the ownership of tips paid to the redcaps for services rendered during the course of their employment. This argument is based on authorities which stand for the general principle that the earnings of an employee in the course of his employment belong to the employer. See *Restatement of Agency*, Section 388, p. 870; Note, 13 A. L. R. 905; 39 C. J. 125; Labatt, *Master and Servant* (2d ed., 1913), Vol. 5, p. 6320. The *Restatement* makes it plain, however, that the rule is applicable only "unless otherwise agreed" by the parties (Section 388, p. 870), and that "an agent may retain gratuities received on account of the principal's business if, because of custom or otherwise, an agreement to this effect is found" (Section 388, p. 871). The basis of the principle is thus the understanding of the parties, not a dominant power of the employer to force conditions of employment upon an unwilling employee.

Clearly where, as in the case of redcaps, there is a custom manifesting the parties' understanding to the contrary, the rule does not prevail. This is indicated not only by all of the decisions dealing

directly with the right of employees to keep tips for themselves (see, p. 16n, *supra*), but also by the cases cited on the point in *all* authorities relied upon by respondents.[14] The cases upon which respondents rely all deal with entirely different situations.[15]

Respondents' argument is suggestive of the conception that the servant, as successor to the slave, is bound without limitation by the will of the master. Cf. Holmes, *The Common Law*, pp. 226, *et seq.* But in a society of free men the relationship of agency, or master and servant, is a contractual one founded upon the intention of the parties. Cf. *Restatement of Agency*, Sections 1, 15, pp. 7, 50; *Mechem on Agency* (1889) Sec. 1, pp. 1–2.

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[14] 39 C. J. 125; Labatt, *Master and Servant* (2d ed, 1913), Vol. 5, pp. 6334, 6321–6322. The quotation from a footnote in Labatt (p. 6322) as to the "true doctrine" is admittedly contrary to the authorities cited in the same section.

[15] The cases cited involve such questions as the right of an agent to make a secret profit through a breach of fiduciary duty (*Morrison* v. *Thompson*, L. R. 9 Q. B. 480 (1874)), or the status of proceeds received or claimed by a servant or agent while working for another rather than his employer on his employer's time (*Reynolds* v. *Roosevelt*, 8 N. Y. Supp. 749 (1890)); cf. *Sheppard Publishing Co.* v. *Harkins*, 9 Ontario L. R. 504 (1905), or the right of an employee to recover from the employer for notary service for which he has not been paid anything in addition to his regular wage. *Leach* v. *The Hannibal & St. Joe Ry. Co.*, 86 Mo. 27 (1885).

The cases on the subject are collected in Note, 13 A. L. R. 905. The Note shows that tips have uniformly been held to be the property of the employees (p. 921).

Once the terms of employment are fixed by custom or express or implied agreement, they cannot be changed by the employer alone, unless, by necessary implication or otherwise, the employees' acceptance is obtained.[16]

We do not mean to suggest that ordinarily an employer may not fix the conditions of employment and require his employees to abide by them. But the obligation imposed upon the employee is derived from his consent to the conditions, implied from his engaging in the work of the employer, not from the employer's power to determine conditions irrespective of the employee's consent. For reasons to be discussed, the principle of implied acceptance cannot be availed of by respondents in these cases. See, pp. 26–32, *infra*.

4. *Provisions of other statutes*

Both petitioner (in No. 1023) and respondents rely on provisions in other statutes as an aid to the

[16] This does not mean that an employer may not require an employee to obey his instructions, for every contract of employment, by implication of fact unless the contrary appears, gives the employer such authority. But this power unilaterally to determine how his business shall be run does not extend to changes in the most vital provisions of the contract of employment, such as those relating to wages, without obtaining at least the implied acceptance of the employee to the new conditions. Although an employee would understand, without anything being said, that acceptance of the job required him to obey orders, he would not assume that the employer could lower his wages at will, without his consent or acquiescence.

construction of the Fair Labor Standards Act. The Railroad Retirement Act of 1937 [17] and related statutes [18] define "compensation" so as specifically to exclude tips, thus indicating that in legislation for the benefit of railroad employees Congress has not intended tips to be treated as compensation. The term "compensation" found in those statutes is, of course, broader than the reference to "wages" paid by the employer in the Fair Labor Standards Act and the purposes of the two Acts are in no way comparable.[19]

Respondents refer to decisions under workmen's compensation and unemployment compensation acts. But these all deal with the calculation of benefits under such statutes; such benefits are normally based on "earnings" or "compensation" or "advantages received from the employer," expressions broader than those found in the Fair Labor Standards Act. In order to insure employees of benefits based upon the real income de-

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[17] 50 Stat. 307, 45 U. S. C., Supp. V, Sec. 228a (h).

[18] The Carriers Taxing Act of 1937, 50 Stat. 485, 45 U. S. C., Supp. V, Sec. 261 (e), and the Railroad Unemployment Insurance Act, 52 Stat. 1094, 45 U. S. C., Supp. V, Sec. 351 (i).

[19] The Railroad Retirement Board has held that amounts paid redcaps by passengers where the "accounting and guarantee" plan is in effect do not constitute tips. Railroad Retirement Board, Opinion No. 1941, R. R. 35, U. I. 11, September 18, 1941. This opinion is based on the language and purposes of the Railroad Retirement Act, and it expressly disclaims any relationship between the problems treated under the Retirement Act and those arising under the Fair Labor Standards Act (p. 11).

rived from their employment, regardless of the source, the courts have generally held that tips are to be considered in measuring the awards to be granted.[20] For the same reasons the Bureau of Internal Revenue has held that tips are to be included in the basis for compensation under the Social Security Act (S. S. T. 301, 1938–1 Cum. Bull. 456); the definition of wages in that statute as meaning "all remuneration for employment" supports the broad interpretation (49 Stat. 639, 642, 42 U. S. C., Supp. V, Secs. 1011 (a), 1107 (b)).

It is apparent that the diversity of language and purpose in the statutes referred to entitles them to little weight as guides to the construction of the Fair Labor Standards Act. As this Court has recently pointed out (*Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 353):

> Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.

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[20] *Bryant* v. *Pullman Co.*, 188 App. Div. 311, 177 N. Y. Supp. 488, affirmed 228 N. Y. 579, 127 N. E. 909 (1920), certiorari granted sub nom., *Pullman Co.* v. *State Industrial Comm.*, 254 U. S. 624, certiorari dismissed on stipulation, 254 U. S. 666; *Gross' Case*, 132 Me. 59, 166 Atl. 55 (1933); *Powers' Case*, 275 Mass. 515, 176 N. E. 621 (1931); *Sloate* v. *Rochester Taxicab Co.*, 177 App. Div. 57, 163 N. Y. Supp. 904, affirmed 221 N. Y. 491, 116 N. E. 1076 (1917); *Kadison* v. *Gottlieb*, 226 App. Div. 700, 233 N. Y. Supp. 485 (1929); *Lloyds Casualty Co.* v. *Meredith*, 63 S. W. (2d) 1051 (Tex. 1933); but cf. *Alexander Hamilton Hotel Corp.* v. *Board of Review of Unemployment Comp. Comm.*, Sup. Ct. N. J., September 16, 1941.

5. The purposes of the Act

Petitioners (No. 1023, Br. pp. 49, *et seq.*) and respondents both argue that their respective interpretations of the Fair Labor Standards Act are supported by the underlying purpose of the statute. We do not find it necessary to repeat or refer in detail to these conflicting arguments. The legislative history of the Act contains nothing to indicate that any legislator had the tipping problem in mind. Thus, there cannot be said to be any expressed legislative intention on the point, except as manifested in the language of the statute. Although legislative purpose is always an aid to the construction of a law, the normal rule is that the language used is the first and best guide to the intention of the legislature; only if the words of a statute are ambiguous, or if they lead to an absurd or unreasonable result, or if the purpose of the legislature on this point has been otherwise clearly expressed, will legislative purpose be deemed controlling. Cf. *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.

Since in this case there is clear and unambiguous language and no other direct expression of legislative intention on the point, arguments based on the assumed "purpose of Congress" have little force.[21]

[21] If, however, the Court is to assay the congressional purpose, it should consider the effect of the accounting and guarantee plan upon the administration and enforcement

B. THE REDCAPS DID NOT AGREE THAT THE TIPS WERE THEIR EMPLOYER'S PROPERTY OR A PORTION OF THE WAGES PAID BY THE EMPLOYER

We have shown that before the announcement of the "accounting and guarantee" plan the tips were the property of the redcaps, and that, apart from any consent on the part of the redcaps, respondents were not entitled to treat tips as wages under the Fair Labor Standards Act. Respondents argue, however, that the redcaps did consent to the new arrangement and that this was sufficient to change the status of the tips.

This contention is, we submit, contrary to the findings of both the district courts and of the circuit court of appeals. Even in the *Williams* case, which was decided in respondents' favor, the district court found that (No. 112, R. 198), "It does not appear that the redcaps acquiesced in or consented to the plan set forth in said notice" and that "neither side contends that the notice, negotiations, and discussions amounted to a contract."[22] The

of the Act. The report to the Administrator of the Wage and Hour Division, reprinted in the record in No. 112, R. 148–164, shows that redcaps frequently were afraid to report that they had received in tips less than the statutory minimum wage for fear of losing their jobs (No. 112, R. 156–158). Acceptance by the carriers of the redcaps' "accounts" as the basis for the amounts paid also was found to result in inaccuracies and to make effective enforcement of the Act by the Administrator difficult (No. 112, R. 158, 164).

[22] Express findings to the same effect in the *Pickett* case may be found at No. 1023, R. 277, 280, 286–288.

opinions of the circuit court of appeals also admit that "the redcaps did not agree to the plan stated in the notice to them" (No. 1023, R. 302; cf. No. 112, R. 216)). These findings of the three lower courts, since not unsupported, should be accepted by this Court. *Virginian Ry. Co. v. System Federation*, 300 U. S. 515, 542; *Texas & New Orleans R. Co. v. Brotherhood of Railway Clerks*, 281 U. S. 548, 558.

1. *Consent to the "accounting and guarantee" plan cannot be implied from the fact that the redcaps remained at work*

Respondents' argument is that because the redcaps remained at work after it was announced, their acceptance of the "accounting and guarantee" plan must be implied. But the redcaps, through their representatives, protested against the plan and expressly refused to accept it (No. 112, R. 72–84; No. 1023, R. 128–130, 198–199).[23] It does not appear that during the negotiations respon-

[23] Although the plan was put into effect by respondents, the conduct of the redcaps in informing respondents as to the amount of money received as tips and in accepting from respondents the difference between the tips and the statutory wage was not a consent to the plan or a waiver of statutory rights. For the redcaps could take a portion of what was due them without forfeiting their right to the remainder, and they would have obtained nothing from respondents unless they accounted for the tips received. They did not accept the amounts paid them by respondents as payment in full, but on the contrary protested that the amount was insufficient (No. 112, R. 165).

dents even suggested that the redcaps had consented to it (No. 1023, R. 198–199, 280, 286–287; No. 112, R. 76–78, 81–82, 198). Indeed, respondents themselves recognized the failure of the parties to agree to the plan by taking the position that the issue was before the courts and that the ownership of the tip money would not be a subject of negotiation or agreement until the question had been judicially determined (No. 1023, R. 134, 153–154, 287; No. 112, R. 76–78, 81–84, 136–137, 216).

When agreements were finally made covering other conditions of employment, the question of wages and the status of tips was expressly left open (No. 1023, R. 134, 153–154; No. 112, R. 73, 107–116). Thus it is clear that both parties assumed that the question was a legal one on which they had disagreed, and that it was to be determined by the courts upon the basis of such disagreement, not upon the untrue assumption that the redcaps had consented to the plan.

We do not deny that ordinarily the conduct of an employee in working for an employer under specified terms will be taken to be an acceptance of such terms. Under such circumstances there is presumed to be an implied acceptance, implied in fact because the conduct of the employee manifests his assent to the employer's terms and thus makes a contract. But respondents here are insisting that the presumption that acceptance is to be implied when the employees remain at work constitutes an

inflexible rule of law, to be given effect irrespective of the actual expressed intention of the parties.

The terms of the relationship between employer and employee are a matter of contract, which, as in all matters of contract, are dependent upon manifestations of assent by the parties. American Law Institute, *Restatement of the Law of Contracts*, Sections 19–22, pp. 24–27; Williston, *Contracts* (Rev. Ed. 1936), Sections 66–67; *National Bank* v. *Hall*, 101 U. S. 43, 49; *Utley* v. *Donaldson*, 94 U. S. 29, 47. The implication of assent to the employer's terms arising from the employee's continuing at work under them is one of fact and not of law. Cf. *Baltimore & Ohio R. R.* v. *United States*, 261 U. S. 592, 597; *Klebe* v. *United States*, 263 U. S. 188, 192; Williston, *supra*, Section 3; Costigan, *Implied-In-Fact Contracts and Mutual Assent*, 33 Harv. L. Rev. 376, 381–382. As such, it is subject to rebuttal by a showing of the real understanding of the parties, the implication having the effect, at most, of a presumption. *Silva* v. *Providence Hospital*, 14 Cal. (2d) 762, 97 Pac. (2d) 798, 804, and cases cited. See *Smith Baking Co.* v. *Behrens*, 125 Nebr. 718. The actual intention of the parties, at least when openly manifested between them, overcomes the implication of fact which might otherwise be drawn. *Consolidated Products Co.* v. *Blue Valley Creamery Co.*, 97 F. (2d) 23 (C. C. A. 8), certiorari denied, 305 U. S. 629; *Miller* v. *Schloss*,

218 N. Y. 400, 406; *Smith Baking Co.* v. *Behrens,* 125 Nebr. 718; *Earle* v. *Coburn,* 130 Mass. 596; *American Mutual Liability Insurance Co.* v. *McDiarmid,* 211 Ala. 127, 128; Williston, *op. cit. supra,* Secs. 66–67; cf. *Freund* v. *United States,* 260 U. S. 60. Closely in point is *Consolidated Products Co.* v. *Blue Valley Creamery Co., supra.* In that case, the defendant, though refusing to agree that the contract price was binding upon it, continued to accept milk which the plaintiff insisted was being delivered under the contract. The court held that there was no contract, saying (97 F. (2d) at 28):

> It is well-settled that a contract cannot be implied in fact against the express declaration of a party. A contract implied in fact is based on conduct showing an intention to contract, and the implying of such a contract in the face of denials has been described as a contradiction in terms. [Citing authorities.]

Respondents have pointed to cases which hold that an employee who protests against his employers' conditions but continues at work will be deemed to have accepted them. *Shuppan* v. *Peoria Ry. Terminal Co.,* 30 F. (2d) 569 (C. C. A. 7); *L. G. Balfour Co.* v. *Brown,* 110 S. W. (2d) 104 (Tex. Civ. App.); *contra, Smith Baking Co.* v. *Behrens,* 125 Neb. 718. These cases may perhaps be supported on the ground that both parties recognized that by continuing at work the employees did in fact, and despite the protests, accept the employer's terms.

But the records in the instant cases show that there was no such understanding here. As the lower courts found, respondents recognized that the employees had not agreed to their terms, and that no agreement could be reached until the question of law was determined by the courts.

2. *The Railway Labor Act*

Even apart from the general principles of contract law, which, we believe, sustain the holding of the lower courts that the redcaps had not agreed to respondents' plan, the same result would be compelled in view of the provisions and purposes of the Railway Labor Act. Section 2 requires that all disputes between the carriers and their employees be considered in conferences between their representatives (Section 2, Second). The Act goes so far as to make it a crime for carriers to change the terms of employment as embodied in agreements without the holding of such conferences (Sections 2, Seventh, and 6). Even though the latter provisions are not applicable here because of the absence of a pre-existing agreement, they demonstrate that the policy of Congress is violated if an employer may, in disregard of the protests of his employees' representatives, force new conditions of employment upon them before any collective bargaining takes place.

The fundamental purpose of the Railway Labor Act is, of course, the prevention of any interruption to interstate transportation. Respondents in-

sist that because the employees remained at work they must be deemed to have consented to the terms against which they protested. On respondents' theory the redcaps had the alternatives either of consenting or of striking. But the policy of the Railway Labor Act is that employees shall not leave the service until all peaceful means of settling disputes have been exhausted; the Act creates detailed machinery which is to be availed of in order that disputes may be settled amicably without any stoppage of transportation. To hold that employees have consented to the forfeiture of their claims, because, instead of striking when the employer suddenly announces new terms of employment, they protest and seek to settle the dispute peacefully while remaining in service, would obviously contravene this fundamental policy and the purpose for which the statutory machinery was established. A premium would be placed on strikes as against the peaceable settlement of controversies. Such a result would be contrary to the public policy embodied in the Railway Labor Act that labor disputes be disposed of without resort to economic warfare.

C. ANY CONSENT BY THE REDCAPS TO THE "ACCOUNTING AND GUARANTEE" PLAN IS INEFFECTIVE TO DEFEAT RECOVERY

Even if the redcaps' continuance at work under the "accounting and guarantee" plan be considered a consent to its terms, they are still entitled to recover. Before the inauguration of the plan, the tips when given were clearly the property of the

redcaps (see p. 15, *supra*.) The plan as set forth in the notices distributed to the redcaps (No. 112, R. 121–122, No. 1023, R. 127–128) provided that the tips, although retained by the redcaps, were to be credited against the statutory minimum wage. The notices did not state that the tips, when given, were no longer to be the redcaps' property, but merely provided, in effect, that the redcaps were to turn over *their* property to respondents to be applied to the minimum wage respondents were required to pay.[24] The fact that the passengers paying the tips were not notified as to any change in the status or ownership of the tips they paid and that they still intended the tips to belong to the redcaps supports the conclusion that no change from the situation prior to the Act occurred or was intended.

Since the tips remained the redcaps' property when received, their consent to the plan would have amounted, at most, to an agreement that they would turn over some of their own funds or property to respondents in return for the minimum wage. This is not, we submit, a compliance with the Act. If an employee may not by contract directly waive his statutory rights,[25] he cannot

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[24] The carriers at that time had not entirely receded from the position that redcaps were not employees (No. 1023, R. 22–23, 175, 283; No. 112, R. 7, 128, 201, 215).

[25] "Private agreements which are inconsistent with wage and hour statutes must yield to the broader public policy declared in those acts." *Fleming* v. *Carleton Screw Products Co.*, 37 F. Supp. 754, 757 (D. Minn.); *Fleming* v. *Warshawsky and Co.* (C. C. A. 7th), November 27, 1941.

achieve the same result by surrendering some of his own money to the employer in order to secure payment of the statutory wage. Employers cannot avoid their obligations under the Fair Labor Standards Act "by inducing their workmen to agree not to demand performance of the duties which it imposes * * *." Cf., *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 364.

CONCLUSION

For these reasons it is respectfully submitted that the judgments of the circuit court of appeals should be reversed.

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DECEMBER 1941.

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4 Wage & Hour Rept. 678; cf. *United States* v. *Morley Const. Co.*, 98 F. (2d) 781, 788 (C. C. A., 2d), certiorari denied, sub nom. *Maryland Casualty Co.* v. *United States*, 305 U. S. 651.

U. S. GOVERNMENT PRINTING OFFICE: 1941

FILE COPY

No. 1023 (October Term, 1940).

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

A. J. PICKETT, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, Duly Authorized Representative of James Foster and Others,

Petitioner,

vs.

THE UNION TERMINAL COMPANY, a Corporation,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

PETITION OF A. J. PICKETT FOR A REHEARING.

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Comes now A. J. Pickett, General Chairman of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, duly authorized representative of James Foster and others, and respectfully moves this Court to set aside its opinion and judgment in the above-entitled cause, herein rendered on March 2, 1942, and to grant petitioner a rehearing of this cause, and for grounds of this motion respectfully states that questions decisive of this cause have been overlooked by this Court, and that this Court has erred in affirming the judgment of the Circuit Court of Appeals, as petitioner respectfully submits, in the following respects:

I.

On page 8 of its opinion the Court holds that irrespective of the protest of the red caps against the accounting and guarantee plan, by continuing to work a new contract was created, that is, that the accounting and guarantee plan became a part of the red caps' employment contract. Petitioner respectfully submits that the Court erred in so holding because if employees of railroads subject to the Railway Labor Act must quit their jobs whenever there is a dispute between them and their employer as to a change in their working conditions under penalty of being held to have accepted the employer's terms by remaining in its employ, then the very purpose of the enactment of the Railway Labor Act will be thwarted. As the Court observed on page 9 of its opinion, the object of the act is to avoid interruption to commerce by providing means of settling disputes between railroad carriers and their employees. This purpose can only be effectuated by holding that where there is a dispute between a railroad subject to the act and its employees as to working conditions, the employees shall not be considered to have accepted and agreed to the employer's viewpoint simply because they have continued on the job as the Railway Labor Act contemplates they should do.

The opinion of the Court appears to be based on the general rule that an employee by continuing to work after an employer announces a change of working conditions is conclusively held to have accepted the new conditions regardless of his protestations against the changes, but the Court has overlooked the essential distinction between the ordinary case where the Railway Labor Act has no application, and a case where the act controls the relations between the employer and his employees.

The trial court held in its findings of fact (R. 280) that there was never any meeting of the minds of respondent

and the red caps on the terms of respondent's notice of October 22, 1938, and held that respondent by its conduct thereafter had recognized that the question of whether tips could be considered wages was an open one between the parties (R. 277, 287). We do not understand this Court to hold otherwise so far as any actual consent of the red caps is concerned. The Court apparently bases its decision on the fact that the red caps continued to work after their protest against the new arrangement, and that by so doing they must be held to have accepted the new terms, although, as a matter of fact, they did not do so. The Court's opinion is based on the cases cited by respondent, in none of which was the Railway Labor Act applicable to the parties. We respectfully submit that the Court erred in holding that by the red caps continuing to work a new contract was created, although the trial court found as a fact that there had never been any new contract made between the red caps and respondent (R. 280).

II.

The majority opinion of the Court in holding that the terminal company could lawfully take credit for the red caps' tips against the minimum wage has in effect held that a common carrier not only can become the recipient of tips given by its patrons to its employees, but also can become such recipient surreptitiously by leading its patrons to believe they are tipping the employees, while in fact they are tipping the company. The minority opinion points out the element of deception inherent in such practice. Petitioner respectfully submits that this Court should not put the stamp of approval on deceit of this kind. The dissenting opinion in the case of Ex Parte Farb, 174 Pac. 320, decided by the California Supreme Court, in speaking of a contract whereby an employee agrees to turn over his tips to the employer says:

"The contract * * * is one which is in its essence unconscionable and fraudulent, and is also one which in many, if not most, instances is devoid of that very element of freedom as to one of the parties by which it is sought to be justified. * * * **It is fraudulent in respect to those patrons because it secretly aims to take from them that which they intended for another,** and because its effect is to destroy the very incentive for doing those things for which the gratuity was given * * *." (Emphasis ours.)

In note 29 on page 15 of its opinion the Court says that the plan of the red caps turning in their tips to the company is substantially the same as the tag system inaugurated at the Jacksonville Terminal after the termination of the accounting and guarantee system. Petitioner submits that there is an essential difference in the two systems, especially in view of the fact that the terminal companies are common carriers, in that in the former case the public gives tips to the red caps thinking it is giving them to the red caps, while, as a matter of fact, it is tipping the company, whereas in the latter case the public knows that it is paying the company for the services rendered. The cases cited by the Court in note 10 on page 8 of its opinion on the general question of the validity of a contract to turn over tips, except the Harrison case, an opinion of the District Court of the Western District of Missouri in another red cap case, are distinguishable as none of them involves common carriers. No court has held heretofore that a common carrier may receive tips from the public. Petitioner respectfully submits that this high court should not be the first court to do so, and that this Court should not say to the carriers:

"You cannot openly solicit or receive tips from the public since you are a common carrier, but if you are careful to conceal what you are doing, and not let the public know that you are getting the benefit of tips

it gives to red caps it is entirely legal, reprehensible as it may appear to the ordinary layman, for you to permit the red caps to wheedle tips out of the public, and then claim for yourself the benefit of these tips."

Petitioner respectfully submits that this Court in approving the accounting and guarantee plan is taking a narrow and legalistic view of the case, and that it should not follow the precedents in cases not involving carriers holding that an employer may require an employee to turn over his tips, but should look rather to the intent of the public in giving tips, and say to the carrier that it may not take that which is intended for another, and that if it wants to claim tips, it should let the public know that it is doing so, so that the public may decide whether it will continue to tip the carrier.

III.

On page 16 of its opinion the Court says that there is nothing in the Interstate Commerce Act indicating that the red caps would have a right of action under that act by reason of the carriers taking credit for the tips received by the red caps. Petitioner respectfully submits that the Court has misconceived his position. Petitioner has never claimed and does not now claim that he has any right of action under the Interstate Commerce Act. This suit is not bottomed on the Interstate Commerce Act, but on the Fair Labor Standards Act. Our contention has been, and is, that a common carrier can only receive compensation for services rendered by it by making a charge for the services. It is true the Interstate Commerce Commission in the case of Brownlee v. Southern Railway Company, 192 I. C. C. 119, 121, cited on page 16 of the Court's opinion, held that a carrier may lawfully retain moneys received by it as a charge for transportation service even though no tariff has been filed, to the extent the charge is

just and reasonable. This case is not in point, however, because in the case at bar the terminal company made no charge whatsoever for red-cap service. We do not contend that the respondent could not have lawfully retained moneys received by it as charges for red-cap service simply because a tariff was not filed, nor because the charges were not uniform, but we do say that in order to acquire title to any money received from passengers, it must have been received as a charge for service, openly made and openly paid as a charge, and not covertly received in the form of tips. As a matter of fact, respondent in this case never pretended to make a charge for red-cap service. In the Brownlee case the carrier had actually in its possession money which it had exacted as a charge, and the Interstate Commerce Commission held that even though the charge was made without tariff authority, the shipper could recover only so much thereof as was unreasonable, whereas in the case at bar, respondent has received no money as a charge, but is attempting to claim as its own tips which were never intended for it. Petitioner respectfully submits that this Court erred in holding that it might lawfully do so.

Respectfully submitted,

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E. D. FRANEY,
Attorneys for Petitioner.

Certificate of Counsel.

Charles M. Hay, S. D. Flanagan and E. D. Franey, attorneys for the petitioner in the above-entitled cause, do hereby certify that the above and foregoing petition for a rehearing is presented in good faith and not for delay, and is believed by them to be meritorious.

Charles M. Hay,
S. D. Flanagan and
E. D. Franey,
Attorneys for Petitioner..